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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WALTER BROWNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government must prove an existing employment relationship between an employer and union members to obtain a conviction under 29 U.S.C. § 186(a), and not merely the possibility of a future relationship between the union and the employer.

2. Whether a RICO conviction should be reversed, despite the presence of two sustainable predicate acts, when an appellate court reverses predicate-act findings that lie at the heart of the government's RICO case.

3. Whether a district court's erroneous refusal to instruct on a defendant's theory of defense should be analyzed for harmless-error purposes by reviewing the record to determine whether there is sufficient evidence to sustain the conviction, or whether the conviction should be reversed for a new trial if the defendant adduced evidence to support the requested instruction.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT	6
REASONS FOR GRANTING THE PETITION	16
I. THE ELEVENTH CIRCUIT'S DECISION CONSTRUING 29 U.S.C. § 186(a) CONFLICTS WITH THE SECOND CIRCUIT'S INTERPRETATION OF THE STATUTE AS REQUIRING AN EXISTING RELATIONSHIP BETWEEN THE UNION AND EMPLOYEES TO SATISFY THE "WOULD ADMIT TO MEMBERSHIP" ELEMENT.	16

Contents

Page

II. THE SECOND CIRCUIT'S STANDARD FOR DETERMINING WHETHER RICO CONVICTIONS SHOULD BE UPHELD AFTER AN APPELLATE COURT HAS REVERSED CRITICAL UNDERLYING PREDICATE ACTS SHOULD BE ADOPTED BY THIS COURT. 20

III. THE ELEVENTH CIRCUIT MISAPPLIED *NEDER v. UNITED STATES*, 527 U.S. 1 (1999), AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON THE APPLICATION OF HARMLESS ERROR TO A DISTRICT COURT'S ERRONEOUS REFUSAL TO INSTRUCT ON A DEFENDANT'S THEORY OF DEFENSE. 25

CONCLUSION 27

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated October 25, 2007 ..... 1a

Appendix B — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Filed December 19, 2007 ..... 99a

TABLE OF CITED AUTHORITIES

Page

Cases

Arthur Andersen LLP v. United States
544 U.S. 696 (2005) 19

Chapman v. Cal.
386 U.S. 18 (1967) 26

Griffin v. United States
502 U.S. 46 (1991) 24

Jackson v. Virginia
443 U.S. 307 (1979) 23

Neder v. United States
527 U.S. 1 (1999) 3, 5, 25, 26, 27

United States v. Biaggi
909 F.2d 662 (2d Cir. 1990),
cert. denied, 499 U.S. 904 (1991) .. 14, 15, 20, 21, 22

United States v. Cody
722 F.2d 1052 (2d Cir. 1983),
cert. denied, 467 U.S. 1226 (1984) ..... *passim*

United States v. Delano
55 F.3d 720 (2d Cir. 1995).....*passim*

United States v. Dhinsa
243 F.3d 635 (2d Cir. 2001),
cert. denied, 534 U.S. 897 (2001) 22

Cited Authorities

Page

United States v. Eckhardt
466 F.3d 938 (11th Cir. 2006),
cert. denied, __ U.S. __, 127 S. Ct. 1305 (1007) . 26

United States v. Edwards
303 F.3d 606 (5th Cir. 2002),
cert denied, 537 U.S. 1192 (2003) 24

United States v. Faust
850 F.2d 575 (9th Cir. 1988) 27

United States v. Hach
162 F.3d 937 (7th Cir. 1998),
cert. denied, 526 U.S. 1103 (1999) 27

United States v. Pecora
798 F.2d 614 (3d Cir. 1986),
cert. denied, 479 U.S. 1064 (1987) 18, 19

United States v. Sink
355 F. Supp. 1067 (E.D. Pa.),
aff'd, 485 F.2d 683 (3d Cir. 1973) 18

United States v. Therm-All, Inc.
373 F.3d 625 (5th Cir.),
cert. denied, 543 U.S. 1004 (2004) 27

Cited Authorities

Page

United States v. Triana
468 F.3d 308 (6th Cir. 2006) 27

United States v. Vastola
989 F.2d 1318 (3d Cir. 1993) 24

Statutes

29 U.S.C. § 152(3) 7

29 U.S.C. § 186 ..... 2, 25

29 U.S.C. § 186(a) ..... i, 1, 16

29 U.S.C. § 186(a)(2) ..... *passim*

29 U.S.C. § 186(b)(1) 2

18 U.S.C. § 1962(c) 20

28 U.S.C. § 1254(1) 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Walter J. Browne respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App., *infra*) is reported at 505 F.3d 1229. The Eleventh Circuit's order denying rehearing and rehearing *en banc* of December 19, 2007 (App. 99-100), is unreported.

JURISDICTION

The Eleventh Circuit's opinion was filed on October 25, 2007. The court denied petitioner's Petition for Rehearing and/or Rehearing *En Banc* on December 19, 2007.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 186(a) provides:

> "It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser or consultant to an employer or acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend or deliver any money or

> anything of value * * * to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of any such employer who are employed in an industry affecting commerce."

29 U.S.C. § 186(b)(1) provides:

> "It shall be unlawful for any person to request, demand, receive, or accept or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section."

INTRODUCTION

The Eleventh Circuit's decision creates three discrete conflicts among the Circuits, all of which warrant this Court's review. From the court's construction of 29 U.S.C. § 186, the Taft-Hartley Act's anti-union corruption provision, to the court's harmless-error analysis on RICO convictions that are based, in part, on invalidated predicate acts, and finally, the court's creation of a hitherto-unknown harmless-error standard for erroneously refused theory-of-defense jury instructions, the decision has sown considerable precedential disharmony.

First, as the Eleventh Circuit expressly acknowledged, its interpretation of the "would admit to membership" requirement of 29 U.S.C. § 186(a)(2) directly conflicts with the Second Circuit's interpretation of the same statute in *United States v. Cody,* 722 F.2d

1052 (2d Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). The Second Circuit's decision requires, in fidelity with the statutory language and purpose, that an employer have an existing relationship with a union to warrant criminalizing a union official's business relationship with the employer. The Eleventh Circuit, on the other hand, allows the government to obtain a conviction against a union official based on the mere – and entirely theoretical – *possibility* that the union would admit the employees to membership at some future time.

Second, the Eleventh Circuit's decision conflicts, and again admittedly so, with Second Circuit precedent on the role of an appellate court in addressing the consequences of reversing key predicate-act findings on an appeal of a RICO conviction. The Second Circuit allows an appellate court to consider, on a qualitative basis, whether the reversal of key predicate-act findings should require a new trial where the court cannot confidently declare that the jury would have found the defendant guilty had the reversed predicate acts not been submitted to the jury. Rejecting that approach, the Eleventh Circuit has imposed a strict sufficiency-of-the-evidence test, under which a RICO conviction must be upheld, the reversal of key predicate-act findings notwithstanding, if there is sufficient evidence to support the RICO conviction.

Third, the Eleventh Circuit's misapplication of this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), to hold that a district court's erroneous refusal to give a theory-of-defense instruction should be harmless error if there is sufficient evidence to support the verdict, engenders conflict with the established rule,

which has been endorsed in varying formulations by every Circuit, that an erroneous refusal to charge on the defendant's theory of defense is reversible error if the instruction correctly states the law, the evidence supports the theory of defense, and the instructions do not otherwise convey the defense.

Section 186 was designed to protect against union corruption when either an employer currently employed union members and to protect employees from having their union aspirations thwarted through payoffs by their employer to a union or union official. As the Second Circuit held in *Cody*, however, the statute, as plainly written, does not criminalize relationships between an employer and a union official when there is only "the possibility of a future relationship" between the union and the employees. 722 F.2d at 1058. The Eleventh Circuit, rejecting *Cody*, adopted a standard that penalizes relationships between employers and union officials if, on a purely theoretical basis, "the union would admit any of the employees who were currently working for the employer at the time the subject payment was made." (App. 26-27). No other court has so broadly interpreted Section 186. The conflict between the Circuits warrants this Court's review, and a proper deference to the Congress's statutory language will ultimately command approval of the *Cody* standard.

Because the Eleventh Circuit upheld the single Taft-Hartley count on which petitioner was ultimately convicted, as well as the two predicate acts based on Taft-Hartley violations, the court rebuffed petitioner's reliance on the Second Circuit's decision in *United States v. Delano*, 55 F.3d 720 (2d Cir. 1995). In that decision,

the Second Circuit held that RICO convictions should be reversed, "despite the presence of the two legally sufficient predicate acts," where the central charges against the defendant are reversed on appeal, such that "it would be too speculative to assume that," had the reversed counts "been properly removed from the jury's consideration, the jury would have found . . . a threat of continued criminal activity plus relatedness." 55 F.3d at 728-29 (citation omitted).

Application of the *Cody* interpretation of Section 186(a)(2), would doom the Taft-Hartley conviction and predicate acts, making it necessary to consider whether the RICO convictions should survive. This case thus presents the Court with opportunities both to establish a clear standard for analyzing RICO convictions when key predicate supporting acts are reversed on appeal and to dissipate an inter-Circuit conflict that quite likely will continue to engender inconsistent results.

Finally, the Eleventh Circuit's adoption of the *Neder* harmless-error standard – which, by its terms, applies only to a failure to instruct on an *undisputed* element of a criminal charge – to govern a district court's erroneous rejection of a theory-of-defense instruction, such that such error will be harmless if there is evidence to support the conviction, creates yet another conflict. The long-established rule is that a refusal to instruct on a legally viable theory of defense is reversible error if there is evidence to support *the defense*, and the court's misapplication of the *Neder* standard thus turns the established rule upside down.

STATEMENT

1. Petitioner Browne and his co-defendant, Patricia Devaney, were charged in a 19-count indictment. (R:210). The charges against Browne were based on his alleged misconduct in running two unions: the Federation of Public Employees (FOPE), a division of the Marine Engineers Beneficial Association (MEBA); and the FOPE's successor, The National Federation of Public and Private Employees (NFOPAPE). *Id.* Counts 1 and 2 charged, respectively, RICO conspiracy and a substantive RICO violation. (R:210:6-36). Several of the 12 charged predicate acts alleged against Browne were also charged as substantive crimes in Counts 3-6, 8, and 11-16. (R:210:13-18, 30-33, 37-39, 42-45). Browne was charged with theft of honest services in Count 7, mail fraud in Counts 17-18, and violations of union-record keeping requirements in Count 19. (R:210:34, 39-42, 46-47).

Browne was acquitted on many of the substantive charges and predicate acts. (R:346; R:446:54). He was ultimately found guilty of: (i) RICO conspiracy; (ii) the substantive RICO charge (based on five remaining predicate acts); (iii) a single Taft-Hartley criminal offense; (iv) two counts of mail fraud; and (v) the record-keeping violation. (R:346).

2. Browne has been a lifelong union official. (R:432:19; R:447:113). The charges against him arise from alleged acts during his service as the FOPE's director, a post he assumed in 1977, and during his subsequent service as the NFOPAPE's president, beginning in 1996. Count III, the single Taft-Hartley

offense of which Browne was convicted (and which is also alleged as Predicate Act 1), charged him with accepting $250,000 between 1993 and 1998, from Hvide Marine (Hvide). (R:210:13). Browne was also found to have committed Predicate Act 2, which charged him with accepting $12,500 between April and October 1995, from International Cruises, and Predicate Act 4, which charged him with having accepted $4,000, between September 1994 and July 1996, from Coleary Transport. (R:210:14-15).[1] All of the Taft-Hartley counts and predicate acts were based on 29 U.S.C. § 186(a)(2).[2] The factual basis for the Taft-Hartley charge and predicate-act allegations are set forth below.

Hvide Marine. Hvide, which regularly retains lobbyists and consultants, paid Browne a total of $250,000

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[1] The government alleged a total of eight RICO predicate acts, as well as two additional Taft-Hartley charges. (R:210:13-18; 37-39). Browne was found not guilty on those counts and was found not to have committed the remaining predicate acts. (R:346).

[2] At trial and on appeal, Browne challenged the Taft-Hartley conviction (and related predicate act) and the two predicate acts on two bases: (i) that the "would admit to membership" element required the government to establish that his union either represented employees from whose employer he had accepted monies; and (ii) because supervisors are excluded from the definition of "employee" under the Taft-Hartley Act, 29 U.S.C. § 152(3), and both the MEBA and NFOPAPE primarily, if not exclusively, represented supervisors, there was no violation of Section 186(a)(2). (App. 15-20). The Eleventh Circuit assumed that "Browne is correct in his assertion that the term "employee" in § 186 does not include supervisors," and focused on the "would admit to membership" provision. (App. 20).

through 1998 (which payments Hvide reported to the IRS), for Browne's work as a consultant and lobbyist, pursuant to a November 1993 agreement. (R:430:112-27; R:438:175-76; R:444:62; Ex.83-84; Ex.417).[3] Browne and other Hvide lobbyists assisted Hvide in seeking an extension of a tugboat contract with Fort Lauderdale's Port Everglades in 1995-96. (R:440:29-34).[4]

In 1995, when the FOPE was a MEBA division, Browne approached the MEBA's president, Joel Bem, and the union's secretary-treasurer, Mark Zalenski, to discuss Hvide's plans to build double-hulled tankers. (R:431:40-41). Hvide intended to create a new operating company for the tanker venture, of which Hvide would be a 50% owner. (R:431:81-82). Hvide was considering using officers from another union, the American Maritime Officers (AMO), which union is not affiliated with the AFL-CIO. (R:431:42).

Union officials met with Hvide representatives in December 1995 to discuss union members serving as engineers and officers on the new ships. (R:430:158-59, 188-89; R:431:42-43; Ex.89). But Bem was thereafter defeated as the MEBA's president and the new president rejected the proposal. (R:430:167-70; R:431:47-49, 79-84).

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[3] Count 19, the recordkeeping allegation against Browne (R:210:46-47), is based on Browne's failure to report these payments, as well as the payments alleged in the other two Taft-Hartley charges, to the Labor Department. (R:442:56-57).

[4] Browne registered with Broward County as a Hvide lobbyist for 1995-96. (R:442:21-22; Ex.308).

International Cruises. International Cruises was a start-up venture formed by Robert Gries and William Nelson to build a new gambling ship that would operate out of Port Everglades. (R:438:194-97; R:441:133-38).[5] Nelson and Gries hired Mary Anne Gray, a former port commissioner who ran a consulting firm. (R:438:134-35; R:441:139). Gray hired Browne, who also had previously served as a port commissioner, as a subcontractor for $12,500. (R:438:128-29, 140-45, 180-81; R:441:141; Ex.1; Ex.7). Browne and Gray introduced Nelson to local business leaders, politicians, and lawyers. (R:438:206-09).[6] Gray sent Browne an IRS Form 1099. (R:438:181).

The MEBA's president and Gries signed a "prehire agreement" in July 1995, which agreement, "in the case of officers, supervisors, is an intention by the company and the union to employ our people and enter into a more formal contract once they reach agreement." (R:431:54-55; Ex.11-A). Such agreements "can only deal with supervisory personnel." (R:431:65). The prehire agreement was also contingent upon International

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[5] International Cruises is also referred to as Coastal Gaming. (R:210:14). One of International Cruises' principals had been involved in that venture before forming International Cruises, and he used the Coastal Gaming name because International Cruises was not yet incorporated. (R:441:133-36, 154-55). Checks were written on Coastal Gaming's account and International Cruises reimbursed Coastal Gaming. (R:441:154-55).

[6] Gray testified that she had turned to Browne on the International Cruises project because of Browne's experience in dealing with port officials, and not because of his union position. (R:438:178-82).

Cruises obtaining a berth at Port Everglades. (R:441:155; Ex.11). International Cruises abandoned the venture after the Broward County Commission voted to conduct a feasibility study on the application. (R:431:19-20; R:438:158-59).

Coleary Transport. William Coleman founded Coleary Transport in 1984. (R:440:41). He and Browne were "very close friends." (R:440:44). Coleman obtained a stevedore cargo franchise in November 1992 and a steamship franchise in 1993. (R:440:47-48; Ex.20).

Coleman gave Browne a total of $6,000 between November 1993 and December 1995. (R:444:64-65; Ex.18). He considered Browne to be his consultant. (R:440:98). Coleman testified that Browne had been financially strapped, and that the payments had been gifts. (R:440:51-53). Coleman filed IRS Form 1099s for the payments because "it wasn't something we were trying to sweep under the rug." (R:440:100).[7]

In 1996, Coleman discussed with Browne the possibility of unionizing Coleman's employees, because "most of the work done for . . . passenger ships was done by union companies." (R:440:55). The NFOPAPE sent a letter to Coleary Transport on July 18, 1996, demanding recognition for the NFOPAPE as the employees'

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[7] Coleman cooperated with the government. (R:440:89). He pled guilty to a Taft-Hartley charge arising from his payments to Browne and to an unrelated charge of making false statements, and was not sentenced to prison. (R:440:82-86).

bargaining representative, but no contract resulted. (R:432:53-57; R:440:59; Ex. 22).[8]

3. On appeal, the Eleventh Circuit upheld the jury's verdict on Count 3/Predicate Act 1, both of which rested on the Hvide relationship. (App. 20-37). The court declined to address the sufficiency of the evidence to support Predicate Acts 2 and 4. (App. 39).[9]

The court first described Section 186(a)(2), with an emphasis on the "who are employed" clause:

> In order to be understood properly, the "would admit to membership" clause must be read in light of the subsection as a whole – specifically, the "who are employed" clause. The plain language indicates that there can be no criminal liability under § 186(a)(2) – or, by extension, for the intended recipient of a payment under § 186(b)(1) – unless, at the time the payment was made or agreed upon, the employer currently had employees who would be admitted to membership in the union. The use of the present tense ("are employed")

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[8] The MEBA's president testified that the International Longshoreman's Union, like the MEBA and NFOPAPE, is an AFL-CIO affiliate, and that AFL-CIO affiliation ensures that "you don't organize in someone else's territory"; he would not have authorized a MEBA division to organize a stevedoring unit. (R:431:102-03).

[9] The significance of the court's refusal to address the viability of the jury's findings on Predicate Acts 2 and 4 is addressed *infra*.

> imposes a temporal limitation on the employment status of those employees whom § 186 would protect from corrupt dealing between union officials and employers.

(App. 23) (citations omitted).

The court recognized that the Second Circuit's *Cody* decision required an existing relationship between the union and employees for liability under Section 186(a)(2) – and rejected that interpretation:

> We find the reasoning of *Cody* less than persuasive on this score. . . . [T]he plain language of § 186(a)(2) certainly requires an existing employment relationship, but that association need not be with *current* union members – instead, it need only be the case that the employer has an existing employment relationship with employees who *would be admitted* to the union. The court in *Cody* . . . seemed to conceive of only two possible theories for a prosecution under § 186: either (1) that the employer currently employs individuals who are already union members, in which case a payment by the employer to a union official would constitute a violation, or (2) that the employer would allegedly hire union members in the future, in which case there would ordinarily be no violation. Yet, by its own examination of the statutory language in history, the *Cody* court described a third possibility that encompasses the interpretation relevant here: "subsection

> (a)(2) was added . . . to deal with employers' attempts through bribery of union officials to block unionization of their *present* employees." This interpretation is evident from the plain language of § 186(a)(2); if the "conditional verbiage" of the "would admit to membership" clause is to have any meaning, Congress must have intended § 186 to capture payments to union officials when the employer employs individuals who were not yet union members. We see nothing in the statute or its legislative history to support *Cody*'s seeming assertion that the existing employment relationship must be between the employer and current union members.
>
> Thus, the relevant consideration in applying § 186(a)(2)'s "would admit to membership" clause is whether the union would admit any of the employees who were currently working for the employer at the time the subject payment was made. . . .

(App. 24-26) (citations and footnote omitted; original emphasis).

The court accordingly concluded that

> "the Government was required to prove, for each Taft-Hartley count and predicate act based on § 186(a)(2), that Browne received or accepted the alleged monetary amount from the employer, and that, at the time of the alleged criminal act, the employer had

> employees in an industry effecting commerce whom [the union] would have admitted to membership."

(App. 29-30) (footnote omitted). Determining that the jury could have found that the MEBA and NFOPAPE "would have sought to organize Hvide's existing employees despite the presence of practical or legal roadblocks to actual organization," the court held that "Browne violated the Taft-Hartley Act when he accepted payments from Hvide." (App. 37).

4. Having upheld Count 3/Predicate Act 1, the court turned to Browne's contention that striking *all* of the Taft-Hartley claims required reversal of the RICO and RICO conspiracy counts because the jury quite likely would not have found Browne guilty without the overarching influence of the Taft-Hartley charges. (App. 40-41). Browne relied on the Second Circuit's decisions in *United States v. Biaggi*, 909 F.2d 662, 692-93 (2d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991), and *United States v. Delano*, 55 F.3d 720 (2d Cir. 1995). (App. 41, 50-51). Because the court had upheld Count 3/Predicate Act 1, although declining to address Predicate Acts 2 and 4, its analysis of Browne's claim for a new trial proceeded from the assumption that the jury properly found Browne guilty of at least one Taft-Hartley crime and predicate act. (App. 41-42).[10]

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[10] The court seemingly recognized that the government's simplistic argument, *i.e.*, "a RICO conviction will survive appeal whenever at least two valid predicate acts remain, regardless of whether other predicate acts are invalidated," should not prevail. (App. 42). But the court analyzed the RICO convictions solely

(Cont'd)

The court, however, concluded its analysis by rejecting the Second Circuit's analytical model:

> [W]e cannot accept Browne's suggestion that we adopt the reasoning of the Second Circuit in *Delano*. That case is unpersuasive because it would require unwarranted speculation into the jury's decisionmaking. The court states that it must decide whether, without the invalid predicate acts, "the jury nonetheless *would have found* that Delano committed . . . a pattern of racketeering activity." We disagree with that premise; . . . the question should be whether a rational jury could have found that the pattern requirements were met. Neither *Delano* nor the sole case on which it relies, *United States v. Biaggi*, 909 F.2d 662, 692-93 (2d Cir. 1990), provides any authority for the proposition that a court must reverse a RICO conviction whenever the jury might (or might not) have based its pattern finding on predicate acts later determined to be insufficient.

(Cont'd)

from a sufficiency/"continuity" perspective, rather than from a perspective framed by a reversal of *all* Taft-Hartley charges, because the single Taft-Hartley violation had been upheld. (App. 42-50). Indeed, the court specifically noted that "*Delano's* holding applies, at most, to cases in which the invalidated predicate acts dominate the RICO prosecution," and the charge based on the Hvide payments would have supported a finding that "the acts were part of [Browne's] 'regular way of doing business.'" (App. 51).

(App. 50-51) (citations omitted; original emphasis). The court also upheld the RICO conspiracy conviction, for the same reason. (App. 53) ("[a]s we have declined to adopt the reasoning of *Delano*, and we find sufficient evidence in the record that supports the [RICO conspiracy] conviction, even assuming the Predicate Acts 2 and 4 . . . fail, we affirm Browne's conviction").

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S DECISION CONSTRUING 29 U.S.C. § 186(a) CONFLICTS WITH THE SECOND CIRCUIT'S INTERPRETATION OF THE STATUTE AS REQUIRING AN EXISTING RELATIONSHIP BETWEEN THE UNION AND EMPLOYEES TO SATISFY THE "WOULD ADMIT TO MEMBERSHIP" ELEMENT.

In *United States v. Cody*, 722 F.2d 1052, 1056 (2d Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984), the Second Circuit reversed a conviction under 29 U.S.C. § 186(a)(2), which had been based on a construction company having provided the union official defendant with the use of a rent-free apartment. The construction company neither had a contract with the union nor employed any union members, and the government based the prosecution on the company's "plans to erect an office building . . . that would be subject to a 'high-rise construction' agreement" between the company and the union. *Id.*

The Second Circuit held that "a literal reading of § 186 is entirely appropriate because it is consistent with the statute's purpose – to deter and punish the bribery

of employee representatives by employers and the extortion of employers by employee representatives." 722 F.2d at 1058. Reviewing Section 186's provenance in the 1959 Labor Management Reporting and Disclosure Act, the court concluded that "the statute was designed to protect the possible future unionization of present employees, not, as here, the possible future hiring of present union members." *Id.* at 1058-59. Because interpreting Section 186 to allow a conviction based on the mere *possibility* that union members might be employed in the future would be "inconsistent with [the statute's] purpose," the court was impelled to construe Section 186 to require an "*existing* employment relationship, between the employer and members of the union, not the possibility of a future relationship." *Id.* at 1058 (original emphasis). The statute's "would admit to membership" requirement, which the court aptly described as "conditional verbiage," cannot be satisfied because the construction company *subsequently* would have employed union members, "if and when it built . . . the office building." *Id.*

In the absence of the construction company's employment of union members, or even of evidence showing "actual plans to build a new building" at the time that the apartment was provided to the union official, the Second Circuit held that the connection between the employer and the union official "was too nebulous at the time the gift was made to be the basis for a criminal charge," even if "it could be surmised that [the construction company] hoped to obtain future good will" from the union official. *Id.* at 1059. Section 186 thus criminalizes *only* those payments that are made to a union official when future hiring is more than

hypothetical, *i.e.*, when there is a potential collective bargaining relationship in the offing. *Id.* at 1059 ("it is this type of corruption that the framers of Section 186 sought to deter" rather than "where the plans were unformed and the friendly relationship was not then fairly susceptible to a more disparaging interpretation").

Before the Eleventh Circuit's decision in this case, only two other decisions had addressed the "would admit to membership" requirement to Section 186. In *United States v. Sink*, 355 F. Supp. 1067 (E.D. Pa.), *aff'd*, 485 F.2d 683 (3d Cir. 1973), which predates *Cody*, the district court rejected the defendant's contention that the "would admit to membership" language was unconstitutionally vague, based on the court's construction of the statute to require "a present intention of the employees to apply for union membership or present intention of the [the employer to] employ laborers who would and could be admitted to the local union." *Id.* at 1070-71. But the court cautioned – in line with *Cody* – that the "would admit to membership" provision "does not mean some indefinite, uncertain future, vague possibility." *Id.* at 1071.

The only other decision to have addressed "would admit to membership," *United States v. Pecora*, 798 F.2d 614 (3d Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987), involved a prosecution of an employer for paying an union official to influence the union's conduct. The Third Circuit upheld the conviction, despite the defendant having employed no union members, because the "payoff scheme" supplanted the need to prove a present intention to hire existing employees. *Id.* at 624-25.

Pecora is somewhat vague in its treatment of *Cody*, and the Eleventh Circuit read the decision as at least "consider[ing] some form of a 'present intent' test, under which the determination of whether a union 'would admit to membership' would turn on" whether "the *employer* had, at the time of the payment, the present intent to hire individuals who either were union members or would be admitted to membership after being hired" or "the union had the present intent to admit the employer's employees at the time the payment was made." (App. 26-27). The court appeared to reject any such test. (App. 27-28).

The conflict between the Eleventh Circuit's construction of the "would admit to membership" provision and the Second Circuit's *Cody* decision is stark, patent, and readily recognized in the Eleventh Circuit's opinion. This Court has spoken directly and pointedly to the dangers of expanding a criminal statute's reach by judicial fiat:

> We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that a fair warning should be given to the world in language that the common world would understand, of what the law intends to do if a certain line is passed. . . .

Arthur Andersen LLP v. United States, 544 U.S. 696, 703 (2005) (citations and internal quotations omitted). The Court noted that "[s]uch restraint is particularly appropriate . . . where the act underlying the conviction . . . is by itself innocuous." *Id.*

Here, Browne's "underlying act" – providing services openly and publicly to a local business, in exchange for compensation – is indeed "by itself innocuous," and becomes criminal *only* if Section 186(a)(2) is satisfied. *Cody*'s interpretation of Section 186(a)(2), which hews strictly to the statute's plain meaning, accords Congress the requisite deference and, perhaps more importantly, provides the requisite "fair warning" to unions and union officials "of what the law intends to do if a certain line is passed."

II. THE SECOND CIRCUIT'S STANDARD FOR DETERMINING WHETHER RICO CONVICTIONS SHOULD BE UPHELD AFTER AN APPELLATE COURT HAS REVERSED CRITICAL UNDERLYING PREDICATE ACTS SHOULD BE ADOPTED BY THIS COURT.

The Eleventh Circuit's decision also admittedly conflicts with the Second Circuit's precedent addressing an appellate court's disposition of appeals in which critical predicate acts are overturned by the appellate court, although sufficient predicate acts remain numerically to satisfy the RICO requirements. *See* 18 U.S.C. § 1962(c). The Eleventh Circuit's wooden sufficiency-of-the-evidence test fails to account for the realities of a jury's consideration of predicate acts to support a RICO conviction

In *United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991), the Second Circuit, after holding that the district court had erroneously excluded evidence that could have affected the jury's findings on some – but not all – of the RICO

predicate acts, held that the defendant was entitled to a new trial, despite the existence of other properly found predicate acts. The court reasoned that the predicate acts as to which the evidence had been excluded "dominated this prosecution," leaving it "at least questionable whether [the] jury would nonetheless have convicted him of the RICO offenses," had the excluded evidence been admitted. *Id.* at 693.

The Second Circuit thereafter applied *Biaggi* in *United States v. Delano*, 55 F.3d 720 (2d Cir. 1995), in which a city parks director was charged with numerous offenses arising from his operation of his department as a racketeering enterprise. *Id.* at 723. Among the predicate acts were numerous charges of larceny by extortion under state law, which the court found not to have been proven. *Id.* at 727. Addressing whether the defendant was entitled to a reversal of the RICO conviction, the court noted that the jury had found the defendant to have committed two Hobbs Act violations that had also been charged as predicate acts, such that "for the purposes of our review, Delano engaged in the conduct of a racketeering enterprise through a pattern of racketeering that included at least two predicate acts." *Id.* at 728. The court accordingly addressed "whether, had the evidence relating to the larceny extortion incidents been excluded or limited, the jury nonetheless would have found that Delano committed the Hobbs Act offenses as part of a pattern of racketeering activity." *Id.*

The court recognized that "[i]n some circumstances, the jury's finding of two predicate acts, lawfully constituting a RICO pattern, and of the other elements

of a RICO offense, would permit affirmance of a RICO conviction notwithstanding the invalidation of other predicate acts." 55 F.3d at 728 (quoting *Biaggi*, 909 F.2d at 693). But the court applied *Biaggi* to reverse the RICO convictions for a new trial:

> Following [*Biaggi*'s] rationale, we likewise refuse to affirm the RICO convictions despite the presence of the two legally sufficient predicate acts. As with the bribery predicates in *Biaggi*, the proof concerning Delano's seventeen alleged violations of New York's larceny by extortion statute represented the bulk of this RICO prosecution, eclipsing all else. Under the circumstances, it would be too speculative to assume that, had the acts of larceny by extortion been properly removed from the jury's consideration, the jury would have found the two "constituents of RICO's pattern requirement," a threat of continued criminal activity plus relatedness, solely on the basis of the two Hobbs Act predicates. Therefore we refuse to hazard a guess at Delano's expense as to whether the jury would have convicted Delano of the RICO charges even in the face of their finding the commission of two Hobbs Act violations. Accordingly we reverse the substantive RICO and RICO conspiracy convictions and remand for new trial. . . .

Id. at 728-29 (citation omitted); *cf.*, *United States v. Dhinsa*, 243 F.3d 635, 670 (2d Cir. 2001), *cert. denied*, 534 U.S. 897 (2001) (RICO conviction upheld despite reversal

of predicate-act finding; defendant conceded that reversed act "had little or nothing to do with the RICO enterprise"), *cert. denied*, 534 U.S. 897 (2001).

The Eleventh Circuit rejected *Delano* as "unpersuasive because it would require unwarranted speculation into the jury's decisionmaking." (App. 50).[11] The court's rationale, however, utterly ignores the central tenet of the Second Circuit's precedent, *i.e.*, that, where a reviewing court would be required "to hazard a guess ... as to whether the jury would have convicted [the defendant] of the RICO charges" without consideration of the overturned predicate acts, the resulting uncertainty *warrants a new trial*, and *not* an acquittal on the RICO counts. *Delano*, 55 F.3d at 729. That is, the Eleventh Circuit disagreed with *Delano* because, in its view, "the question should be whether a rational jury would have found that the pattern requirements were met" because, under *Jackson v. Virginia*, 443 U.S. 307 (1979), "[s]ufficiency review operates as a backstop to protect the defendant's due process rights, not as a license for the court to second-guess the jury." (App. 49-51). Proceeding from that premise, the court upheld the RICO conviction because "the Government adduced sufficient evidence for a rational jury to find continuity among at least two

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[11] As noted earlier, the court's analysis of *Delano* was skewed in the first instance because the court rejected *Cody* and upheld Browne's conviction on Count 3/Predicate Act 1. The analysis thus commenced from the premise that Browne properly had been found guilty of a serious Taft-Hartley violation that was at the heart of the government's case. (App. 51) ("*Delano*'s holding applies, at most, to cases in which the invalidated predicate acts dominate the RICO prosecution").

predicate acts," including Count 3/Predicate Act 1. (App. 51-53).[12]

There is, accordingly, a stark and irreconcilable split between the Eleventh and Second Circuits.[13] Eschewing the Second Circuit's measured analysis, the Eleventh Circuit has opted for a strict sufficiency-of-the-evidence approach, which fails to take into account the reality of a trial on RICO charges in which critical predicate acts should never have been submitted to the jury in the first instance.

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[12] The same analysis applies to the Eleventh Circuit's rejection of Browne's challenge to the "honest services" mail fraud charge, Count 7, as to which the court adopted its rationale for rejecting *Delano* on the RICO convictions. (App. 57-60).

[13] The need to address this conflict is sharpened by the Eleventh Circuit's reliance on *United States v. Vastola*, 989 F.2d 1318, 1329-31 (3d Cir. 1993), in which the Third Circuit applied *Griffin v. United States*, 502 U.S. 46, 50-51 (1991) (multi-object conspiracy conviction should be upheld if evidence supports conviction as to any object), to RICO convictions in which two predicate acts remain valid after appellate review. *See also United States v. Edwards*, 303 F.3d 606, 642 (5th Cir. 2002) (rejecting argument that "reversal is required as a matter of law where the jury finds a pattern of racketeering based, in part, on predicate acts that have not been proven"), *cert denied*, 537 U.S. 1192 (2003). Browne, like the defendant in *Delano*, has urged a much more measured rule, in which an appellate court may consider whether to accord the defendant a new trial in which the jury considers only properly brought predicate acts in support of RICO charges, once the appellate court has reversed the key predicate acts, upon which the prosecution based an initial prosecution.

III. THE ELEVENTH CIRCUIT MISAPPLIED *NEDER v. UNITED STATES*, 527 U.S. 1 (1999), AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON THE APPLICATION OF HARMLESS ERROR TO A DISTRICT COURT'S ERRONEOUS REFUSAL TO INSTRUCT ON A DEFENDANT'S THEORY OF DEFENSE.

As noted earlier, the Eleventh Circuit assumed that Browne's challenge to the district court's construction of the "supervisor" exception to the Taft-Hartley Act's provisions was correct and that the district court had erred in applying Section 186(a)(2) to the Taft-Hartley charges in Predicate Acts 2 and 4. (App. 30, 37, 53). The court accordingly addressed Browne's claim that he is entitled to a new trial because the district court refused to instruct the jury on the "supervisor" defense to Count 3/Predicate Act 1, concluding that, "assuming that Browne correctly asserts that the supervisory exclusion applies to § 186, it follows that the district court erred in declining to advise the jury of that definition and that Browne's proposed jury charge accurately recited the law." (App. 62).

But the court then turned to this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), and addressed "whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty in the absence of the [instructional] error" as the correct harmless error standard. (App. 63). The court plainly misapplied *Neder*.

In *Neder*, the district court had ruled that materiality in a prosecution for filing a false tax return was a

question for the court, not the jury, and accordingly refused to charge the jury on the element. 527 U.S. at 14. As this Court noted, "[t]he evidence supporting materiality was so overwhelming . . . that Neder did not argue to the jury – and does not argue here – that his false statements of income could be found immaterial," and defended at trial on unrelated grounds. *Id.* at 16-17. This Court held that the error was harmless because it was "beyond cavil here that the error 'did not contribute to the verdict obtained.'" *Id.* (quoting *Chapman v. Cal.*, 386 U.S. 18, 24 (1967)).

Here, of course, as the Eleventh Circuit recognized, the disputed element *was* Browne's defense. (App. 60-61).[14] In every Circuit – including the Eleventh Circuit, *e.g.*, *United States v. Eckhardt*, 466 F.3d 938, 947-48 (11th Cir. 2006), *cert. denied*, __ U.S. __, 127 S. Ct. 1305 (1007) – the governing law is that a district court's refusal to instruct the jury on defendant's theory of defense is

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[14] Indeed, the government *never* argued to the Eleventh Circuit that the error was harmless. There was, of course, ample evidence to support the supervisor defense, despite the district court's having truncated Browne's presentation of that defense based on its erroneous construction of Section 186(a)(2). Witnesses testified in the government's case that the MEBA represented "licensed officers, primarily, almost entirely," and that "[t]he majority" of the MEBA's members "would be considered supervisors, in the context of collective bargaining." (R:430:141-42, 144-45; R:431:80-81). The MEBA's only non-supervisor members were a "handful" of unlicensed seaman on state-operated ferries in Alaska and Washington. (R:431:60-61, 69-71, 107-11). There was ample – if not *undisputed* evidenced that the MEBA's preliminary and forward-looking discussions with Hvide involved only supervisors. (R:430:188-189; R:431:54-55, 65). The government never argued otherwise on appeal.

reversible error if the instruction is correct and supported by the evidence. *E.g., United States v. Triana*, 468 F.3d 308, 315-16 (6th Cir. 2006); *United States v. Therm-All, Inc.*, 373 F.3d 625, 638 (5th Cir.), *cert. denied* 543 U.S. 1004 (2004); *United States v. Hach*, 162 F.3d 937, 946 (7th Cir. 1998), *cert. denied*, 526 U.S. 1103 (1999); *United States v. Faust*, 850 F.2d 575, 583 (9th Cir. 1988). The Eleventh Circuit's misapplication of *Neder* reverses the requisite analysis: rather than looking for evidence to *support the incorrectly denied instruction*, the court conducted a sufficiency analysis on an issue that was hotly disputed at trial to uphold the district court's erroneous refusal to instruct on Browne's theory of defense. The misapplication of *Neder* and the resultant conflict with the law in the Circuits on this issue warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED OCTOBER 25, 2007

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-11137

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WALTER J. BROWNE, a.k.a. BUSTER, PATRICIA A. DEVANEY, a.k.a. PATRICIA BROWNE, a.k.a. PATRICIA CARDONE, a.k.a. PATRICIA BROWNE CARDONE,

Defendants-Appellants.

October 25, 2007

Before TJOFLAT and HULL, Circuit Judges, and RESTANI,* Judge.

TJOFLAT, Circuit Judge:

The crimes in this case arose from the activities of Walter J. Browne and his sister, Patricia A. Devaney, as a high-ranking official and administrative assistant,

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* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

respectively, in two labor unions. Accused of lining their pockets by abusing their positions in the unions, the defendants in this brother-and-sister operation were prosecuted under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Taft-Hartley Act, and other federal statutes proscribing embezzlement and fraud. After a two-month joint trial, Browne was convicted of eight counts and acquitted of seven counts, and Devaney was convicted of nine counts and acquitted of six counts. The Government obtained an order of forfeiture for which the defendants were held jointly and severally liable. In addition, the defendants received prison sentences, and Devaney was ordered to pay restitution. Both now appeal, contesting the legal and factual support for their RICO and Taft-Hartley Act convictions, the district court's denial of severance, and the order of forfeiture.

We affirm the defendants' convictions and sentences in all respects. The structure of the opinion is as follows: Part I provides the facts relevant for purposes of this appeal. Part II describes the charges against the defendants and the proceedings in the district court. Parts III through VI examine the issues raised on appeal by the defendants.

I.

As an understanding of the membership and organizational structure of the two labor unions is crucial to this appeal, we first describe these unions, the defendants' involvement therewith, and the incidents leading to prosecution.

Appendix A

Founded in 1875, District 1-Marine Engineers Beneficial Association ("D1-MEBA") is an AFL-CIO-chartered labor organization headquartered in Washington, D.C. Throughout the relevant period, D1-MEBA represented both licensed and unlicensed seamen in its maritime divisions.[1] These seamen served on all manner of ships, including ships in international commerce, ready reserve force vessels, military sealift command ships, National Oceanic and Atmospheric Administration research vessels, ships of institutions such as Scripps Research Institute and Woods Hole Research Center, and Staten Island ferries.

In addition to representing seamen, D1-MEBA also represented non-maritime workers. In its Professional Office Industrial Division ("POID"), D1-MEBA represented land-based employees who handled the freight and offices of shipping companies whose maritime employees were represented by D1-MEBA's maritime divisions. D1-MEBA also represented various public-sector employees, ranging from school bus drivers to custodial workers, in its Federation of Public Employees ("D1-MEBA/FOPE") division, which was headquartered in Broward County, Florida. Although

1. Licensed seamen include captains, mates (first, second, and third), and engineers (chief, first-assistant, second-assistant, and third-assistant). Unlicensed seamen primarily take direction from the officers, and usually outnumber licensed seamen on a vessel. However, not all licensed seamen are deemed supervisors for collective bargaining purposes; generally, captains, first mates, and chief and first-assistant engineers are considered supervisors.

POID and D1-MEBA/FOPE were administered as separate divisions, their members were considered full voting members of D1-MEBA.

Walter J. "Buster" Browne became executive director of D1-MEBA/FOPE in 1977. Under Browne's leadership, the membership of D1-MEBA/FOPE grew steadily. In 1988, D1-MEBA merged with the National Maritime Union, a union that primarily represented unlicensed seamen, and became D1-MEBA/NMU. Sometime thereafter, Browne was forced out of the newly merged entity by D1-MEBA president Gene DeFries. Browne went to Washington, D.C., and became involved in a movement to oust DeFries. The merger did not last; DeFries and others were indicted on charges including election rigging and embezzlement,[2] and in late 1991, D1-MEBA voted to secede and reconstitute itself as an autonomous entity under its original name. It retained a number of unlicensed seamen who worked on state-operated ferries in Alaska and Washington state. In 1992, the new leadership of D1-MEBA restored Browne to his former position as D1-MEBA/FOPE's executive director.

During the fall of 1993, Browne's sister, Patricia A. Devaney, attempted suicide by ingesting a large quantity of pills and alcohol. The failed attempt was precipitated by her depression, heavy drinking, and the loss of her job at the Broward County sheriff's office. After receiving psychiatric and rehabilitative treatment,

2. Browne was named in the same indictment for his role in rigging the election in favor of DeFries, to which he pled guilty.

Devaney moved into Browne's house. Browne hired Devaney as his administrative assistant and gave her a car. Although Devaney initially performed clerical work, she later began taking charge of the division's finances, causing the office manager who had previously handled the finances to become offended and to quit.

As executive director, Browne was permitted to make union-related telephone calls on union cell phones and union calling cards. He was also permitted to incur certain entertainment and travel expenses, so long as they were related to the union's business. Under the Labor Management Reporting and Disclosure Act, the union was required to file a Labor Organization Annual Report, or LM-2, detailing financial receipts and disbursements, including union-related expenditures, and to retain sufficient records documenting and explaining such transactions for at least five years. *See* 29 U.S.C. §§ 431(b), 436; 29 C.F.R. § 403.3. Accordingly, D1-MEBA regulations required that each employee *personally* complete expense vouchers and attach substantiating documents justifying the expenses, such as receipts. Contrary to these regulations, Devaney often completed Browne's expense vouchers. Furthermore, D1-MEBA accountants noticed that supporting documentation for expenses charged to Browne's union credit card was frequently late or missing.

In October 1993, Browne began working as a lobbyist and consultant for Hvide Marine, Inc. ("Hvide"), a marine company operating out of Port Everglades in Broward County. Browne accepted monthly payments from Hvide from October 1993 to July 1998. In total, these payments amounted to $254,000.

Appendix A

By late 1993, the swelling ranks of D1-MEBA/FOPE and POID members began to generate friction. Because of previous attempts by leaders of the former merged entity to marshal the increasing number of votes held by members of D1-MEBA/FOPE and POID, members of the maritime divisions feared that those non-maritime divisions would eventually dilute the traditional maritime focus of the union. For their part, members of D1-MEBA/FOPE and POID believed they would be better served by a separate union. D1-MEBA therefore decided to create an autonomous affiliate union, the National Federation of Public and Private Employees ("NFOPAPE"), to represent directly the bargaining units of D1-MEBA/FOPE and POID.

With the help of a $250,000 loan from D1-MEBA, NFOPAPE headquarters were established in Fort Lauderdale, Florida. The new union was organized into two divisions: the Federation of Private Employees and the Federation of Public Employees. Browne was named president of NFOPAPE and divisional president of the Federation of Public Employees. Devaney also began working for NFOPAPE, answering to both Browne and Gilbert Carrillo, who was hired as in-house counsel of the Federation of Public Employees.

Browne was keen to establish NFOPAPE's autonomy from D1-MEBA and its Washington, D.C. headquarters. He directed the drafting of NFOPAPE's own constitution to ensure that, despite its affiliation with D1-MEBA, NFOPAPE would have its own structure and identity. Under the affiliation agreement,

bargaining units from D1-MEBA would be transferred by election to NFOPAPE. Upon NFOPAPE's creation, POID's bargaining units were transferred to the Federation of Private Employees. In addition, approximately half of D1-MEBA/FOPE's bargaining units were transferred to the Federation of Public Employees; the remaining units were retained by D1-MEBA until they were likewise transferred by late 1996 or early 1997. Thus, Browne continued to serve as D1-MEBA/FOPE's executive director for a couple years, remaining on D1-MEBA's payroll.

As with his position at D1-MEBA, Browne's positions at NFOPAPE also permitted him to incur travel and entertainment expenses related to union business, for which he could be reimbursed by personally submitting expense vouchers and substantiating documentation. In addition, NFOPAPE policy required the secretary/treasurer to approve such expenses. Under the division bylaws of the Federation of Public Employees, it was also the responsibility of the secretary-treasurer, together with the divisional president, to maintain custody of the books and records, to supervise the financial accounts, to give financial reports at membership meetings, and to sign checks for disbursement from the division's accounts.

Shortly after NFOPAPE's formation, Browne hired George Zakaib as the secretary-treasurer of the Federation of Public Employees. Zakaib was a former custodian and repairman who served as shop steward of the custodial unit. He had never attended college, had

no financial training, and had never been involved in union finances. As secretary-treasurer, Zakaib primarily worked as a recruiter of new members. At membership meetings, his sole responsibilities were to lead the pledge of allegiance and to handle the raffle tickets. Zakaib did not have access to the union's books and records, never signed payroll checks, and never reviewed union credit card bills, bank statements, entertainment expenses, or travel expenses. Rather, it was Devaney who handled the union's books and records, received and paid bills, processed expense vouchers, and managed payroll. On several occasions, Zakaib complained to Devaney and requested the opportunity to review the union's books and records, but Devaney told him to "go fishing." Devaney complained to Browne that Zakaib was "starting a ruckus" about the records, to which Browne responded that he would "take care of it." Zakaib also complained to Carrillo and Browne, even threatening to resign. Although Browne assured Zakaib that he would "take care of it," Zakaib's duties did not change.

Despite having shown initial improvement after her treatment, Devaney had eventually relapsed into heavy drinking and depression. Carrillo became seriously concerned that Devaney's drinking problems rendered her unfit to handle the union's finances, and feared that Devaney's use of a union car would create liability issues for the union. Carrillo spoke with Browne on more than one occasion, requesting that Browne take the union car away from Devaney and place Devaney in a rehabilitation program. Browne did not do so.

Appendix A

In 1995 and 1996, an accountant retained by the union, George Maribella, indicated to NFOPAPE officials that additional internal controls over the union's accounting functions were necessary. In August or September 1996, a dispute arose over NFOPAPE's repayment of the $250,000 loan from D1-MEBA. D1-MEBA President Alexander Shandrowsky wrote a letter to Browne requesting permission to audit the books and records of NFOPAPE, which Browne refused. Flanked by D1-MEBA officials and an independent auditor, Shandrowsky then paid a visit to NFOPAPE headquarters. Browne again refused to allow access to the financial records. In October 1996, Shandrowsky terminated Browne as executive director of D1-MEBA/FOPE, primarily because of Browne's refusal to permit D1-MEBA to audit NFOPAPE's books and records, but also because he believed that Browne was attempting to "raid" units in the Broward County area that were represented by other labor organizations. Following his termination from D1-MEBA, NFOPAPE took over responsibility for Browne's salary.

In late 1996, NFOPAPE retained an outside accounting firm to audit the union's financial statements going forward. One of that firm's partners, Nadine Bellows, had several occasions to report on the audited financial statements at the union's membership meetings. In her letters to union management, Bellows noted that the union's internal controls were "weak or non-existent," because Devaney was handling the bulk of the bookkeeping and financial duties. She recommended that such duties be divided among several

persons, to provide for segregation of duties pursuant to standard accounting procedures. As of her year-end audit for 1999, Bellows noted that none of the previous years' recommendations had been implemented by the union.

Beginning in 1997, Devaney began authorizing increased payments to herself through payroll. She also issued checks to her husband, who had previously been employed as consultant to the union, and cashed the checks herself. In 1999, the union hired Tina Kaiser as a bookkeeper. Kaiser noticed suspicious bonus checks issued to Devaney and her husband. Not wanting to approach Browne, Kaiser mentioned her observations to several other union officials, including Pat Lambert, a union representative at the Broward County sheriff's office. At the Labor Day picnic in September 1999, Lambert informed Browne that Devaney was stealing from the union. In November 1999, Devaney altered her payroll scheme. Rather than issuing checks to herself or her husband, she began issuing unwarranted payroll checks to her daughter, who edited the union newsletter. Devaney then cashed the checks herself.

In March 2000, Devaney went from a full-time to a part-time employee of the union in order to work for the Broward County sheriff's office. When she requested her vacation pay in advance, Kaiser informed a union official that Devaney had already received her vacation pay. The ensuing investigation revealed that Devaney had embezzled $116,207.66 from payroll, and she was terminated. On May 16 of that year, Devaney sent the

union a letter of apology and a check for $1,500 as voluntary restitution. After the sale of her condo for $56,000, Devaney bought herself a new car for $21,000 and sent the union a $25,000 check on October 21.

II.

On May 8, 2003, a Southern District of Florida grand jury returned a twenty-count, second superseding indictment charging Browne and Devaney with various offenses. Count 1 charged both defendants with conspiring to violate RICO.[3] Count 2 charged both defendants with a substantive violation of RICO[4] and listed fifteen predicate acts committed by Browne, Devaney, or both.

Counts 3 through 6 charged Browne with accepting payments from certain employers in violation of §§ 302(b)(1) and (d)(2) of the Taft-Hartley Act. *See* 29 U.S.C. §§ 186(b)(1), (d)(2).[5]

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3. 18 U.S.C. § 1962(d) makes it unlawful for any person to conspire with any other person to violate §§ 1962(a), 1962(b), or 1962(c).

4. 18 U.S.C. § 1962(c) makes it unlawful "for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

5. 29 U.S.C. § 186 prohibits any person from requesting, demanding, receiving, accepting, or agreeing to receive or accept, any thing of value from certain employers.

Count 7 charged Browne with committing "honest services" mail fraud in violation of 18 U.S.C. § 1341.[6]

Counts 8 and 9 charged both defendants and Devaney alone, respectively, with embezzlement from a labor union in violation of 29 U.S.C. § 501(c).[7]

Count 10 charged Devaney under 18 U.S.C. § 1344 for bank fraud.[8]

Counts 11 through 18 charged both defendants with committing mail fraud in violation of 18 U.S.C. § 1341 by submitting expense vouchers for the reimbursement of personal expenses.

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6. The federal mail fraud statute makes it unlawful to use the United States mails in furtherance of "any scheme or artifice to defraud, or [to] obtain[ ] money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341. In 1988, Congress broadened the mail fraud statute so that in addition to protecting against schemes to obtain money and property, the term "scheme or artifice to defraud" includes schemes to deprive individuals of "the intangible right of honest services." 18 U.S.C. § 1346.

7. 29 U.S.C. § 501(c) prohibits any person from embezzling the assets of a labor organization of which he is an officer or employee.

8. The federal bank fraud statute prohibits any person from executing or attempting to execute a scheme or artifice (1) to defraud a financial institution, or (2) to obtain any of the assets owned by a financial institution by fraudulent means. 18 U.S.C. § 1344.

Count 19 charged Browne and Devaney with failing to maintain labor organization records in violation of 29 U.S.C. § 439(a).[9] Count 20 charged Devaney under 29 U.S.C. § 439(c) for destroying and falsifying records related to the union's payroll.[10]

Finally, the indictment included a forfeiture count against both defendants, seeking forfeiture pursuant to 18 U.S.C. § 1963 in the event of conviction under Counts 1 or 2.[11]

Browne filed two pretrial motions for severance which were denied. The defendants were tried in a joint trial beginning on April 5, 2004. At the close of the Government's case, the defendants moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 on certain counts. The district court

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9. 29 U.S.C. § 439(a) requires every labor union to submit to the Secretary of Labor an annual financial report (known as forms LM-2 or LM-3) of salaries, allowances, reimbursed expenses, and other disbursements to all officers and to employees receiving more than $10,000, and to maintain supporting documentation thereof.

10. 29 U.S.C. § 439(c) prohibits the willful making of false entries or concealing, withholding, or destroying any records required to be kept in connection with 29 U.S.C. §§ 431 and 433.

11. In pertinent part, 18 U.S.C. § 1963 mandates forfeiture of any interest acquired or maintained in violation of 18 U.S.C. § 1962, and any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of § 1962. 18 U.S.C. § 1963(a)(1), (3).

subsequently granted Browne acquittals on the mail fraud charges in Counts 17 and 18, which also eliminated Predicate Act 15 of Count 2, but reserved ruling on the remainder of the counts. The defendants renewed their Rule 29 motions at the close of all the evidence, on which the district court reserved decision.

On June 2, 2004, the jury found Browne guilty of Counts 1-3, 7, 12-14, and 19. With respect to the substantive RICO violation, Count 2, he was found to have committed Predicate Acts 1, 2, 4, 13, and 14. Devaney was found guilty of Counts 1, 2, 9, 10, 13, and 17-20. The jury found that she had committed Predicate Acts 10-14 of Count 2.

Following sentencing hearings, Browne received concurrent prison sentences of 70 months for Counts 1, 2, and 7, 60 months on Counts 3, 12-14, and 12 months on Count 19. He also received three years' supervised release for Counts 1-3, 12-14, and one year for Count 19. Devaney received concurrent sentences of 27 months' imprisonment for Counts 1, 2, 9, 10, 13, 17, and 18, and 12 months on Counts 19-20. She also received five years' supervised release and was ordered to pay $87,100 in restitution.[12] Finally, the defendants were held jointly and severally liable under an order of forfeiture in the amount of $592,271.32.

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12. NFOPAPE's insurer, Ulico Casualty Company, paid NFOPAPE $87,100 for the losses related to Devaney's payroll embezzlement.

The district court denied the defendants' motions for judgment of acquittal and for new trial. Each defendant timely appealed.

III.

Browne first argues that the district court erred in interpreting the criminal section of the Taft-Hartley Act on which several of the counts against him were based. *See* Labor Management Relations (Taft-Hartley) Act § 302 (as amended), 29 U.S.C. § 186. The indictment contained four counts alleging separate violations by Browne of that section of the Act. Section 186 also served as the basis for eight of the predicate acts alleged against Browne in support of the substantive RICO count. The jury ultimately found Browne guilty of one Taft-Hartley count and that he had committed three of the Taft-Hartley predicate acts alleged in Count 2. These counts and predicate acts will be described in greater detail, *infra*.

Browne argues that, under the proper interpretation of the statute, the evidence adduced by the Government at trial is insufficient to support his conviction on the Taft-Hartley count and the jury's findings of culpability on the three Taft-Hartley predicate acts. As such, he suggests that he is entitled to entry of a judgment of acquittal on these counts. Alternatively, he argues that the district court erred in denying his request for a jury instruction defining the term "employee" to exclude supervisors, thus requiring a new trial on the Taft-Hartley count and two of the three predicate acts that

the jury found Browne had committed. Ultimately, he argues, the infirmities of the Taft-Hartley count and predicate acts fatally undermine the remaining counts on which he was convicted—including the most serious RICO counts.[13]

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13. Although Browne speaks broadly of his entitlement to a new trial on all counts on which he was convicted, his brief specifically identifies the RICO conspiracy count, Count 1, the substantive RICO count, Count 2, and the theft-of-honest-services mail fraud count, Count 7, as those which were directly implicated by the purported failure of proof of the Taft-Hartley Act count and predicate acts. We discuss the viability of Browne's convictions on these three related counts in part II.B., *infra*.

Although Browne's initial brief proposes that he receive a new trial on these three counts, his arguments generally reiterate the sufficiency of evidence challenge that he made in his unsuccessful Rule 29 motion at the close of evidence at the trial. The remedy for a successful sufficiency challenge under Rule 29 would be entry of judgment of acquittal, not a new trial, but it matters not. We treat his argument as a sufficiency challenge, and we ultimately determine that it must fail. To the extent Browne intended to argue separately that he is entitled to a new trial in the interest of justice on Counts 1, 2, and 7 because of the insufficiency of the challenged predicate acts, *see* Fed.R.Crim.P. 33(a), we deem such an argument waived. *See* Fed. R. Appellate P. 28(a)(9). Browne did not provide any reasoning or citations in his brief on appeal to support such an argument, nor do we find any evidence in our independent review of the record that Browne moved the district court for a new trial on the ground of the insufficiency of the predicate acts. After the verdict, Browne did move the district court for a new trial on severance grounds, *see* part III, *infra*, but he specifically requested only judgment of acquittal on Counts 1, 2, and 7.

Our review of this issue proceeds as follows. We begin in part III.A by determining the proper interpretation of § 186, then examining the sufficiency of the evidence to support Browne's conviction on the Taft-Hartley violation alleged in Count 3, which was also alleged as Predicate Act 1. We then consider in part III.B the remaining two Taft-Hartley predicate acts that the jury found Browne had committed, as well as Browne's convictions for the substantive RICO violation, RICO conspiracy, and "honest services" mail fraud. In part III.C, we address Browne's argument challenging the jury instructions on certain of the Taft-Hartley charges.

A.

The Taft-Hartley Act, as amended, regulates various aspects of labor organizations and practices, but in part, the Act serves as "a conflict-of-interest statute designed to eliminate practices that have the potential for corrupting the labor movement." *United States v. Phillips*, 19 F.3d 1565, 1574 (11th Cir.1994), *amended on other grounds by* 59 F.3d 1095 (11th Cir.1995). To this end, § 186 generally prohibits employers in industries affecting commerce from paying anything of value to labor organizations or their officials, and conversely prohibits labor representatives from receiving anything of value from employers. *See id.*

Browne was charged in Counts 3-6 of the second superseding indictment, and in Predicate Acts 1-8 under the substantive RICO count (Count 2), with violations of § 186(b)(1). That subsection provides, in pertinent

part: "It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section." 29 U.S.C. § 186(b)(1). Subsection (a), in turn, establishes four sets of circumstances under which the employer who makes or agrees to the prohibited payment may be criminally liable; thus, the liability of the recipient of the prohibited payment is coextensive with that of the employer. The Government framed each Taft-Hartley count and predicate act in the indictment with reference to payments prohibited by § 186(a)(2) specifically, which provides in pertinent part:

> It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or *would admit to membership*, any of the *employees* of such employer who are employed in an industry affecting commerce[.]

29 U.S.C. § 186(a), (a)(2) (emphases added).

The jury found Browne guilty of Count 3 and found that he had committed Predicate Acts 1, 2, and 4 of Count 2. Each count and each predicate act alleged that Browne unlawfully received monetary payments from a different employer whose employees D1-MEBA and/or NFOPAPE would have admitted to membership. Count 3 and Predicate Act 1 alleged the same conduct—namely,

that between October 1993 and July 1998, Browne accepted approximately $250,000 from Hvide. Predicate Act 2 alleged that Browne accepted approximately $12,500 from April to October 1995 from an agent of Coastal Gaming Group, Inc. ("Coastal Gaming"), which was doing business as International Cruises, Inc. In Predicate Act 4, the Government alleged that Browne accepted approximately $4,000 between September 1994 and July 1996 from the owner of Coleary Transport, Inc. ("Coleary Transport").

Browne contests the district court's interpretations of two provisions of § 186 as they relate to the Government's case on each of these counts. First, he argues that the district court erred in ruling that the term "employee," as used in § 186(a)(2), includes supervisors. Under Browne's interpretation, supervisors are excluded from the definition of "employee" by the terms of the applicable definition sections in Title 29. Thus, he asserts, the proper interpretation of the term "employee" renders insupportable the jury's findings on Count 3 and Predicate Acts 1 and 2 of Count 2, all of which involve what Browne characterizes as negotiations for his unions to provide only supervisory employees to potential employers.

Second, Browne argues that the district court erred in interpreting the term "would admit to membership" as used in § 186(a)(2). In short, Browne suggests that the district court interpreted this provision too broadly, allowing the jury to convict him of Count 3 and find him

responsible for each of the three predicate acts on the basis of evidence that, in his estimation, was insufficient to prove what is required under the statute—namely, an existing employment relationship between the employer in question and members of the union.

For reasons that will be explained infra, this appeal does not require us to interpret definitively the term "employee." As such, we leave that issue for another day, and for the limited purpose of discussion here, we assume that Browne is correct in his assertion that the term "employee" in § 186 does not include supervisors. Instead, we focus our attention on the "would admit to membership" provision. Ultimately, we must determine what elements of proof are required of the Government to obtain a conviction under the Act, and against those we measure the sufficiency of the evidence on each of the contested counts and predicate acts.

1.

With regard to the "would admit to membership" provision of § 186(a)(2), Browne argues that the district court applied an "unduly broad interpretation" in deciding his motions for judgment of acquittal. Browne suggests that the district court erred in its consideration of his sufficiency of evidence challenge to the Taft-Hartley counts because the court focused its analysis on whether the employers at issue "had the present intent . . . to employ" members of D1-MEBA or NFOPAPE by hiring them for positions that had yet to be created but

would be filled in the future.[14] In his view, in order for the Government to sustain its burden of proof under the

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14. In essence, Browne suggests that the district court's application of a "present intent to employ" standard caused the court to deny entry of a judgment of acquittal on the basis of evidence pertaining to certain pre-hire agreements that Browne had negotiated with the employers on behalf of the unions. These pre-hire agreements provided for the possible future employment of union members, not the possible future unionization of the employer's then-current employees as Browne now contends is required by the statute.

Because we review *de novo* both the interpretation of statutes and challenges to the sufficiency of evidence, we need not dwell on how the district court analyzed this issue. We would be remiss not to note, however, that the "present intent to employ" standard applied by the district court derived directly from Browne's own proposed instruction to the jury on the "would admit to membership" clause. In his proposed instructions submitted before the district court held its charge conference, Browne suggested the following instruction, which the court ultimately delivered to the jury:

> With respect to establishing whether NFOPAPE or District Number 1—MEBA was a labor organization which "would admit to membership" any of the employees of the employer, the term "would admit to membership" means that at the time the acts were performed and done, there was either a present intention for the employees of the employer to apply for membership *or that there was a present intention for the employer to obtain work in the area and to employ employees that would or could be admitted into membership* in NFOPAPE or District Number 1—MEBA.

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"would admit to membership" clause, it must prove "an existing employment relationship between the employer and union members."

When construing a criminal statute, we begin with the plain language; where "the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992)). By its terms, § 186(a)(2) prohibits payments by an employer to an officer of a labor organization when the labor organization "represents, seeks to represent, or would admit to

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(Emphasis added). This language appears to have been drawn from *United States v. Sink*, 355 F.Supp. 1067, 1070-71 (E.D.Pa.1973), which used such a standard in instructing the jury. Moreover, in its order denying Browne's post-trial motions for judgment of acquittal and new trial, the district court explicitly noted that the "present intention" standard was included in the jury instructions "[a]t the Defendants' request."

Although we cannot know for sure, Browne's recognition of his role in creating this issue likely informed his decision on appeal not to challenge the "would admit to membership" jury instruction. Instead, he limits his argument on that clause to the sufficiency of the evidence in light of what he undoubtedly hopes will be a more favorable interpretation of the statute by this court. In any event, we interpret the statute and consider the sufficiency of the evidence on the Taft-Hartley counts independently of the district court's rulings on these issues.

membership, any of the employees of such employer *who are employed* in an industry affecting commerce." 29 U.S.C. § 186(a)(2) (emphasis added). In order to be understood properly, the "would admit to membership" clause must be read in light of the subsection as a whole—specifically, the "who are employed" clause. The plain language indicates that there can be no criminal liability under § 186(a)(2)—or, by extension, for the intended recipient of a payment under § 186(b)(1)—unless, at the time the payment was made or agreed upon, the employer currently had employees who would be admitted to membership in the union. The use of the present tense ("are employed") imposes a temporal limitation on the employment status of those employees whom § 186 would protect from corrupt double-dealing between union officials and employers. *Cf. Allied Chem. & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166, 92 S.Ct. 383, 391, 30 L.Ed.2d 341 (1971) (interpreting the statutory definition of "employee" under the Taft-Hartley Act "not to be stretched beyond its plain meaning embracing only those who work for another for hire"), *accord. Folsom v. Prospect Hill Resources, Inc. (In re Prospect Hill Resources, Inc.)*, 837 F.2d 453, 455 (11th Cir.1988) (per curiam); *Blassie v. Kroger Co.*, 345 F.2d 58, 68 (8th Cir.1965) (Blackmun, J.) ("An employee ordinarily is a person presently engaged in employment.").

The few reported cases to have considered the meaning of the "would admit to membership" clause do not compel an alternative interpretation. Browne relies heavily on *United States v. Cody*, in which the Second Circuit reversed the conviction of a union official, holding that the

"connection" between the union official and the employer was "too nebulous" to support a charge under § 186. *United States v. Cody*, 722 F.2d 1052, 1059 (2d Cir.1983). The employer in *Cody* employed no union members at the time the union official received the thing of value (in that case, a rent-free apartment), and the court was unpersuaded by the Government's argument that the employer would have employed union members on a future building contract for which there were then no "actual plans." *Id.* at 1057-59.

Here, Browne draws on the language of *Cody* in suggesting that the "would admit to membership" clause requires "an *existing* employment relationship, between the employer and *members of the union.*" *Id.* at 1058 (second emphasis added). We find the reasoning of Cody less than persuasive on this score, however. As we have noted above, the plain language of § 186(a)(2) certainly requires an existing employment relationship, but that association need not be with *current* union members—instead, it need only be the case that the employer has an existing employment relationship with employees who *would be admitted* to the union. The court in *Cody*, responding directly to the Government's two arguments in that case, seemed to conceive of only two possible theories for a prosecution under § 186: either (1) that the employer currently employs individuals who are already union members, in which case a payment by the employer to a union official would constitute a violation,[15]

15. It is hardly debatable that a payment to a union official who currently represents employees of the employer would fall

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or (2) that the employer would allegedly hire union members in the future, in which case there would ordinarily be no violation.[16] *Id.* Yet by its own examination of the statutory language and history,

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within the scope of § 186(a)(2), for that subsection prohibits payments to any labor organization or officer thereof "which *represents*, seeks to represent, or would admit to membership any of the employees of such employer who are employed in an industry affecting commerce." 29 U.S.C. § 186(a)(2) (emphasis added). The statutory language is quite clear in its application when current employees of the employer are already represented by the labor organization.

16. In general, we believe that the Cody decision improperly emphasizes whether the "motive" behind the payments falls within the category of evils that Congress meant to address by enacting § 186. *See Cody*, 722 F.2d at 1058 (noting that one of the Government's theories of liability was "too indirect to support the claim that [the union official] had sufficient leverage to extort from [the employer] or that [the employer] had any incentive to bribe [the union official]"); *id.* at 1059 (observing, in discussing another case, that "it could be inferred that a motive for the gift was to discourage efforts to organize the employer's workers"). As Cody itself later observes, "the employer's purpose for making a payment is irrelevant since all payments, aside from those statutorily excluded, are unlawful." *Id.*; *see also United States v. Ryan*, 350 U.S. 299, 305, 76 S.Ct. 400, 404, 100 L.Ed. 335 (1956) (dictum) (interpreting an earlier version of § 186 as "a criminal provision, malum prohibitum, which outlaws all payments, with stated exceptions, between employer and representative"); *Phillips*, 19 F.3d at 1580-81 ("Congress must have intended sections 186(a)(1)-(2) to prohibit payments to representatives even if they were made without any intent to influence.") (dictum).

the *Cody* court described a third possibility that encompasses the interpretation relevant here: "subsection (a)(2) was added . . . to deal with employers' attempts through bribery of union officials to block unionization of their *present* employees." *Id.* This interpretation is evident from the plain language of § 186(a)(2); if the "conditional verbiage" of the "would admit to membership" clause is to have any meaning, *see id.*, Congress must have intended § 186 to capture payments to union officials when the employer employs individuals who were not yet union members. We see nothing in the statute or its legislative history to support *Cody*'s seeming assertion that the existing employment relationship must be between the employer and current union members.[17] *See id.*

Thus, the relevant consideration in applying § 186(a)(2)'s "would admit to membership" clause is whether the union would admit any of the employees who were currently working for the employer at the time the subject payment was made. We note that other courts have considered some form of a "present intent" test, under which the determination of whether a union "would admit to membership" would turn on either (a) whether the *employer* had, at the time of the payment, the present intent to hire individuals who either were union members or would be admitted to membership after being hired, or (b) whether the union had the

17. The case cited by the *Cody* court in support of that proposition, *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. at 169, 92 S.Ct. at 392, does not, in our reading, bear on the question.

present intent to admit the employer's employees at the time the payment was made. *See United States v. Pecora*, 798 F.2d 614, 622 (3d Cir.1986) (considering, but ultimately rejecting, a "present intent" theory); *United States v. Sink*, 355 F.Supp. 1067, 1071 (E.D.Pa.1973) (denying motions for judgment of acquittal and new trial where the jury had been instructed that "would admit to membership . . . means at the time the acts were performed and done . . . there was a present intention for [the employer] to obtain work in the Philadelphia area and to employ employees that would and could be admitted to membership in [the union]"), *aff'd mem.*, 485 F.2d 683 (3d Cir.1973). As the Third Circuit did in Pecora, we reject these formulations as inconsistent with the statutory language. The first suggested "present intent" test would improperly allow for liability under the "would admit to membership" clause of § 186(a)(2) in situations where the employer had no current employees who would be admitted to membership, but instead had the present intent to hire individuals in the future who would be admitted to membership. As we have explained *supra*, this interpretation would be inconsistent with the statutory provisions requiring an existing employment relationship between the employer and the employees who would be admitted.[18]

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18. Our holding here rules out the possibility that the statute could impose criminal liability on either a union official who receives a payment, or a potential employer who makes one, while the would-be employer has no employees at that time who would be admitted. We recognize that this decision may limit the Government's ability to initiate prosecutions under § 186 when

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there is only a possible future employment relationship (i.e., no existing relationship) between a potential employer and individuals who would be admitted to membership in the union.

Arguably, such a result would seem to run counter to the statute's broadly stated purpose to address "instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct" among "labor organizations, employers, labor relations consultants, and their officers and representatives." Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), Pub.L. No. 86-257, § 2(b), 73 Stat. 519, 519; *see also Cody*, 722 F.2d at 1059 ("[T]here may be circumstances in which the possible future hiring of unionized workers might lead to abuses that § 186 was designed to prevent."); S. Rep. 86-187, at 13 (1959), U.S.Code Cong. & Admin.News 1959, pp. 2318, 2329-30 (noting that amendments to the earlier version of § 186 under the Taft-Hartley Act would "strengthen[ ]" the statute "by making it applicable to all forms of extortion and bribery in labor-management relations some of which may slip through the present law"). For example, it may hypothetically be possible (yet probably rare) that a prospective employer, having no employees at present, could anticipate needing unionized labor in the future and—seeking to obtain a "sweetheart deal" with the union in advance—commence payoffs to a given union official. Such a scenario would seem to encompass the evils in labor-management relations that Congress meant § 186 to prevent.

Notwithstanding Congress's sweeping statements of principle, we cannot read the plain language of § 186(a)(2), with its reference to "employees . . . who are employed," to allow the imposition of criminal liability in circumstances involving nothing more than a prospective employer's possible future hiring of

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Furthermore, the second formulation—which would require that the union have the present intent to admit the employees—"would seem to render the 'would admit to membership' language superfluous, since section [186(a)(2)] also prohibits payments to officers of a labor organization which 'seeks to represent' a group of employees, language more suited to the 'present intention' situation than the phrase at issue here." *Pecora*, 798 F.2d at 622.

Having established the proper interpretation of the "would admit to membership" clause, we now have all the pieces to assemble a complete statement of the minimum proof required to sustain a conviction under § 186(a)(2). Combining all the elements, the Government was required to prove, for each Taft-Hartley count and predicate act based on § 186(a)(2), that Browne received or accepted the alleged monetary amount from the

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union members. Of course Congress may, in its judgment, seek to amend § 186 to expand its reach. Subsection (a)(2) was added in just this way as part of the LMRDA amendments in response to a decision by a court of appeals recognizing a similar constraint on the statutory language. *See Ventimiglia v. United States*, 242 F.2d 620, 623 (4th Cir.1957) ("A criminal statute is not to be stretched to cases not covered, merely because it may seem to a court that Congress would have done well to cover them."), superseded by statute, Labor-Management Reporting and Disclosure Act of 1959, Pub.L. No. 86-257, sec. 505, § 302(a)(2), 73 Stat. 519, 537 (codified as amended at 29 U.S.C. § 186(a)(2)); S. Rep. 86-187, at 13, U.S.Code Cong. & Admin.News 1959, pp. 2318, 2329-30 (noting the addition of subsection (a)(2)'s language in response to Ventimiglia).

employer, and that, at the time of the alleged criminal act, the employer had employees in an industry affecting commerce whom D1-MEBA or NFOPAPE would have admitted to membership.[19] Again, for the sake of discussion here, we assume Browne's suggested definition for the term "employee" in § 186(a)(2)—that the term does not include supervisors. With that in mind, we now proceed to examine the sufficiency of the evidence for the contested Taft-Hartley count and each of the contested predicate acts.

We review *de novo* a district court's denial of judgment of acquittal on sufficiency of evidence grounds. *United States v. Yates*, 438 F.3d 1307, 1311-12 (11th Cir.2006) (en banc). In reviewing a sufficiency of the evidence challenge, we consider the evidence in the light most favorable to the Government, drawing all reasonable inferences and credibility choices in the Government's favor.[20] *United States v. Puche*, 350 F.3d

19. At trial, the parties stipulated that D1-MEBA and NFOPAPE were "labor organizations," and that Browne was an "officer or employer thereof" at the relevant times, within the meaning of § 186. Furthermore, Browne did not contest his receipt of the payments alleged by the Government. Instead, he focused his defense—just as he focuses his arguments on appeal—on the circumstances of the employees whom the Government alleged would have been admitted to membership in the union at the time the payments were made. Accordingly, we narrow our discussion to that issue and assume, as Browne did, that the evidence was sufficient to satisfy the remaining elements of the Taft-Hartley crimes alleged.

20. The descriptions of the evidence that follow in this opinion reflect the requirement that we consider the evidence in the light most favorable to the Government.

1137, 1142 (11th Cir.2003). If a reasonable jury could conclude that the evidence establishes guilt beyond a reasonable doubt, we will affirm the verdict. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *United States v. Drury*, 396 F.3d 1303, 1312 (11th Cir.2005). This inquiry does not require that the evidence be inconsistent with "every reasonable hypothesis except guilt." *United States v. Starrett*, 55 F.3d 1525, 1541 (11th Cir.1995) (citation omitted). Because we recognize that "the jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial," our sufficiency review requires only that a guilty verdict be reasonable, not inevitable, based on the evidence presented at trial. *See id.* ("In reviewing conspiracy convictions, the question is whether there is substantial evidence to support the verdicts." (quoting *United States v. Russo*, 796 F.2d 1443, 1455 (11th Cir.1986))).

2.

We begin with a review of the evidence in support of the allegation that between October 1993 and July 1998, Browne accepted approximately $250,000 from Hvide. This same conduct underlies substantive Count 3 and Predicate Act 1. We find that, when construed in the light most favorable to the Government, a reasonable jury could have concluded beyond a reasonable doubt that during the relevant time period, Hvide had non-supervisory employees who would have been admitted to D1-MEBA and NFOPAPE.

Appendix A

Hvide was founded in 1958 by a good friend of Browne's named Hans Hvide, and had three divisions: a towing division that provided tug services for several ports in the southeastern United States, an offshore energy support division that provided support services for offshore oil drilling, and a tanker division that transported petroleum and chemicals up the east and west coasts of the United States. By the time Hvide went public in 1996, it had expanded its operations to a worldwide marine services company employing over 3,000 workers. Hvide employees comprised the crew of the towing and tanker divisions.

Even assuming that a portion of the licensed seamen would qualify as supervisors for collective bargaining purposes, and thus be excluded from Browne's definition of "employees," a reasonable jury could conclude that D1-MEBA and NFOPAPE would have admitted to membership the remaining licensed seamen, unlicensed seamen, and land-based support staff in Hvide's employ. The Government adduced testimony that the life blood of the unions was recruitment; active unionization of new members replaced retiring workers, increased the available job base, and ensured the survival of unions. Indeed, at NFOPAPE's inception, Browne "wanted to be able to organize anybody and everybody in the private sector," both in state and out of state. Accordingly, the division bylaws of the Federation of Private Employees were broadly drafted without any restrictions on the types of workers who could be admitted to NFOPAPE: Article I, section 4(f) named as its object "[t]o bring within its membership ranks any and all employees of employers within the scope of this organization's jurisdiction."

There is no question that Hvide's shipboard crew members were precisely the type of workers that were already organized in D1-MEBA's maritime divisions, and Hvide's land-based support employees were of the type that were already organized in POID. As for whether NFOPAPE would have organized maritime workers, the Government introduced "pledge cards"[21] for two proposed divisions of NFOPAPE that would have organized seamen, the United Seafarers of America and the Nautical Workers of America.

Negotiations concerning Hvide's double-hull tanker project provide further support that D1-MEBA and NFOPAPE would have sought to organize Hvide's employees. In 1995, Hvide entered into a venture to build state-of-the-art double-hull oil tankers.[22] Based on certain financing restrictions, Hvide and its partners were required to obtain an agreement with a labor organization to crew the new tankers. In 1995, Hvide approached Browne to request his assistance in securing such a labor agreement. Browne in turn spoke with D1-MEBA officials, and in early December 1995, union officials invited Hvide to the Washington, D.C. headquarters to discuss having union

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21. A pledge card is a document signed by an employee indicating that he wishes a given union to represent him for collective bargaining purposes, and it represents the first step in unionizing employees of a given employer.

22. Following the Exxon-Valdez oil spill, Congress enacted the Oil Pollution Act of 1990 to prevent the accidental discharge of oil by phasing out single hulls in favor of double hulls for oil tankers. *See* 46 U.S.C. § 3703a.

members crew the new tankers from top to bottom. On December 4, Alexander Shandrowsky was elected as the new president of D1-MEBA. Despite Browne's encouragement, Shandrowsky refused to agree to a contract with Hvide, believing that the terms of the contract would have made it "by far and away, the worst contract" that D1-MEBA had.

Although the deal ultimately fell through, the negotiations support the finding that the employees already employed by Hvide were the very types of employees that D1-MEBA and NFOPAPE would have admitted to membership. Indeed, Hvide wanted to be able to transfer some of its employees who were crewing other Hvide ships onto the new oil tankers. Furthermore, during the negotiations, Browne discussed the possibility of organizing the unlicensed seamen aboard the oil tankers into a new, unlicensed division of NFOPAPE, to be called the United Seafarers of America. Browne went so far as to have pledge cards and division bylaws for this new division drawn up and reviewed by a NFOPAPE organizer, Ernest Rumsby, whom Browne informed would become a vice-president of that division.

Browne's principal argument with respect to the Hvide payments is that the "admit to membership" clause does not apply because Hvide's existing maritime employees were already represented by the Seabulk Officer's Association and the Seabulk Seamen's Association. Although these associations were not

affiliated with the AFL-CIO,[23] Browne argues that the "contract-bar doctrine" would have prevented D1-MEBA and NFOPAPE from representing Hvide's existing employees. The contract-bar rule precludes the filing of a petition for an election involving employees covered by a contract of no more than three-years' duration, unless the petition is filed within a certain time period prior to termination of the existing contract. *See Local Union 3074, District 15, United Steel Workers v. Shore*, 386 F.Supp. 600, 602 (W.D.Pa.1975). Its purpose is "to stabilize for a reasonable term an existing contractual relationship between an employer and its employees' bargaining representative." *See N.L.R.B. v. Arthur Sarnow Candy Co.*, 40 F.3d 552, 557 (2d Cir.1994) (quoting *Corallo v. Merrick Cent. Carburetor, Inc.*, 733 F.2d 248, 252 (2d Cir.1984)). In other words, Browne asserts that the unions *would* not have sought to represent Hvide's employees because they *could* not. The Government responds that the Seabulk Officer's Association and the Seabulk Seamen's Association were merely in-house associations of Hvide (Hvide was later renamed Seabulk International Inc.), and that such informal agreements would have presented no true impediment to organization.

Construing the facts in the light most favorable to the Government, it was reasonable for the jury to find that the existence of these agreements would not have prevented D1-MEBA and NFOPAPE from seeking to organize Hvide's employees. As the *Pecora* court

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23. Article 20 of the AFL-CIO constitution prohibits the raiding of one affiliated union by another.

observed, "the existence of possible roadblocks" in the form of "practical or legal impediments to the actual organization of a group of workers" does not conclusively render § 186(a)(2) inapplicable. *See Pecora*, 798 F.2d at 623. Even if the contract bar were otherwise applicable, the contract-bar doctrine would not have prevented the operation of § 186(a)(2) in this case. In the first place, the contract bar is a creation of the National Labor Relations Board; it has no source in any express language of the National Labor Relations Act. *Pecora*, 798 F.2d at 621 n. 3; *Local 1545, United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Vincent*, 286 F.2d 127, 130 (2d Cir.1960). Accordingly, the three-year period is not an inflexible bar; it remains a policy "[w]hich the Board in its discretion may apply or waive as the facts of a given case may demand in the interest of stability and fairness in collective bargaining agreements." *Vincent*, 286 F.2d at 131 (quoting *N.L.R.B. v. Grace Co.*, 184 F.2d 126, 129 (8th Cir.1950)).

Second, and more importantly, an "agreement constitutes a bar to the holding of a representation election for the life of the agreement, *up to a maximum of three years*." *Arthur Sarnow Candy Co.*, 40 F.3d at 557 (emphasis added). After three years have elapsed, "insurgent unions can challenge incumbents for jurisdiction." *Pecora*, 798 F.2d at 621 n. 3. Thus, Hvide's agreements could not have raised an insurmountable bar to the organization of Hvide's employees by D1-MEBA and NFOPAPE for the entire period that Browne was accepting payments from Hvide, namely, October 1993 to July 1998. *See id.* ("It is implausible that the contract

bar could have prevented Local 863 from asserting its jurisdiction during the entire decade that the scheme was in operation.").

A reasonable jury could have concluded that D1-MEBA and NFOPAPE would have sought to organize Hvide's existing employees despite the presence of practical or legal roadblocks to actual organization. Having so decided, a reasonable jury could also conclude beyond a reasonable doubt that Browne violated the Taft-Hartley Act when he accepted payments from Hvide. Thus, we affirm the district court's denial of the motion for judgment of acquittal on Count 3/Predicate Act 1.

B.

Having determined that Browne's conviction on the Taft-Hartley violation embodied in Count 3 and Predicate Act 1 must stand, we now turn our attention to his sufficiency of evidence challenge on the remaining Taft-Hartley predicate acts and other substantive counts of the indictment. As with the Hvide-related charges, Browne moved for entry of judgment of acquittal on the Taft-Hartley violations alleged in Predicate Acts 2 and 4 of Count 2, claiming that the Government had adduced insufficient evidence. Similar to the Hvide charges, Predicate Acts 2 and 4 each alleged that Browne received money from a different employer whose employees either D1-MEBA or NFOPAPE would admit to membership. The jury ultimately found that Browne committed both these acts, and the district court denied the motion for judgment of acquittal.

Browne asserts that the district court erred in submitting Predicate Acts 2 and 4 to the jury, and that ultimately this error taints his convictions for RICO conspiracy, Count 1, the substantive RICO violation, Count 2, and honest services mail fraud, Count 7.

1.

Browne's argument is layered, so we must disassemble it before we can engage in any analysis. For ease of discussion here, we take the substantive RICO violation as our starting point. As relevant here, RICO generally prohibits a person who is affiliated with a broadly defined "enterprise" from conducting that enterprise's affairs through a "pattern of racketeering activity." 18 U.S.C. § 1962(c). In support of this count, the Government was required to prove: (1) that an enterprise existed; (2) that the enterprise affected interstate commerce; (3) that the defendants were employed by or associated with the enterprise; (4) that the defendants participated, either directly or indirectly, in the conduct of the enterprise; and (5) that the defendants participated through a pattern of racketeering activity. *United States v. Starrett*, 55 F.3d 1525, 1541 (11th Cir.1995). We are concerned here with the fifth element—the "pattern of racketeering activity"—which, at the threshold, requires proof that Browne committed at least two predicate racketeering acts. 18 U.S.C. §§ 1961(1), 1962(c); *see also Starrett*, 55 F.3d at 1541.

Appendix A

The Government alleged a total of fifteen predicate acts in the second superseding indictment, twelve of which were charged against Browne. The jury indicated its findings of "Committed" or "Not Committed" for each defendant on each alleged predicate act by responding to a special verdict form. In total, the jury found that Browne committed five of the twelve predicate acts charged against him in Count 2. Two of these—Predicate Acts 13 and 14—alleged mail fraud violations, and Browne does not contest the jury's findings on these acts. The remaining three predicate acts found by the jury were those alleging violations of the Taft-Hartley Act: Predicate Acts 1 (pertaining to Hvide), 2 (pertaining to Coastal Gaming), and 4 (pertaining to Coleary Transport). We have already rejected Browne's challenge to Predicate Act 1, so only acts 2 and 4 remain in dispute. We conclude that an examination of the sufficiency of evidence on these two predicate acts is unnecessary to the disposition of this appeal. As we will explain, even if Browne were correct and he were entitled to reversal of the jury's findings on Predicate Acts 2 and 4, such an outcome would not affect any of the substantive counts of the indictment on which he was found guilty.[24]

With regard to the substantive RICO charge, Count 2, Browne does not challenge the jury's findings on the mail fraud predicate acts (13 and 14), so his argument does not rest on any suggestion that the Government

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24. Browne does not challenge his sentences in this appeal, so we have no occasion to consider whether or to what extent a reversal of the jury's findings on Predicate Acts 2 and 4 would affect his sentencing.

failed to prove at least two predicate acts as required by § 1961(5), even if we assume that Acts 2 and 4 are invalid as he contends. Instead, Browne focuses on the sufficiency of the evidence to establish part of the fifth element of § 1962(c).

To establish the fifth element under § 1962, the Government must prove two components: the predicate acts must relate to the enterprise charged, which we have referred to as the "relationship component," *see Starrett*, 55 F.3d at 1546; and "the predicate acts must actually form a pattern, *i.e.*, relate to each other and have continuity," *United States v. To*, 144 F.3d 737, 747 (11th Cir.1998); *see H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239, 109 S.Ct. 2893, 2900, 106 L.Ed.2d 195 (1989) (holding that the Government must prove not only that at least two predicate acts were committed, but also "that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity"), which we have called the "pattern component." *Starrett*, 55 F.3d at 1546-47. As we have elaborated the former part of the pattern component, the predicate acts must relate to each other (as distinguished from the relationship component), meaning that the predicate acts must "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise [be] interrelated by distinguishing characteristics and . . . not [be] isolated events." *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d 346 (1985) (quoting Title X of the Organized Crime Control Act of 1970, 18 U.S.C. § 3575(e)). It is the latter part of the

pattern component—continuity—that Browne contests in this appeal, so we confine our discussion accordingly.

We will say more about continuity below, but first we summarize the parties' arguments. Browne suggests that, because of "the centrality of the Taft-Hartley charges to the government's case," this court "should not 'hazard a guess'" as to whether the jury would have found the required continuity to satisfy the pattern component solely on the basis of the mail fraud acts alleged in Predicate Acts 13 and 14. In support of his argument, Browne relies heavily on the decision of the Second Circuit in *United States v. Delano*, 55 F.3d 720 (2d Cir.1995). In that case, the jury issued a special verdict, finding that the defendant had committed five RICO predicate acts and convicting him on one substantive RICO count and one count of RICO conspiracy. *Delano*, 55 F.3d at 725. The defendant moved for judgment of acquittal, which was denied. *Id.* On appeal, the court vacated the jury's findings on three of the five predicate acts, holding that the evidence was insufficient. *Id.* at 727. The other two predicate acts remained undisturbed, and, in considering what effect its holding would have on the RICO counts, the court acknowledged that, "for the purposes of our review, [the defendant] engaged in . . . a pattern of racketeering that included at least two predicate acts." *Id.* at 728. Nevertheless, the court reversed the RICO counts and remanded for a new trial. *Id.* at 729. The court reasoned that "it would be too speculative to assume" that the jury would have found relatedness and continuity on the basis of the two remaining predicate acts alone, noting that

"the proof concerning [the invalid predicate acts] represented the bulk of this RICO prosecution, eclipsing all else." *Id.* at 728-29. Here, Browne urges this court to adopt *Delano*'s reasoning. He suggests that because we cannot know what evidence the jury relied on to find that he had undertaken a continuous pattern of racketeering acts, we must reverse the substantive RICO conviction.

Our resolution of this issue is not as simple as the Government at first suggests in its response. For its primary argument in support of the substantive RICO conviction, the Government cites precedent of this circuit as determinative for the proposition that a RICO conviction will survive appeal whenever at least two valid predicate acts remain, regardless of whether other predicate acts are invalidated. *See United States v. Peacock*, 654 F.2d 339, 348 (5th Cir. Aug.1981) ("[C]onviction under § 1962(c) requires only that the defendant be convicted of two acts of racketeering and that the [acts] must be related to the affairs of the enterprise. . . ." (internal quotation marks and citation omitted)), *vacated in part on other grounds on reh'g*, 686 F.2d 356 (5th Cir. Unit B 1982);[25] *see also United States v. Pepe*, 747 F.2d 632, 668 (11th Cir.1984) ("[T]he government proved at least two predicate acts of racketeering beyond a reasonable doubt. This is all the government had to prove to establish a RICO pattern of

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25. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

racketeering and substantive RICO liability."). However, these cases simply do not address the continuity requirement of the pattern component.

That the two decisions omitted any discussion of continuity is unsurprising, as both were decided before the Supreme Court pronounced definitively that continuity and relatedness are necessary components of a pattern under § 1962. *See H.J., Inc.*, 492 U.S. at 239, 109 S.Ct. at 2900. *Peacock* and *Pepe* were decided during a simpler time for the Government in RICO prosecutions, before the statute was complicated by such abstractions as "continuity." Thus, *Peacock* and *Pepe* do not address, much less decide, the continuity issue here.

Moreover, the Government is fully aware of the requirements under *H.J., Inc.* that predicate acts must be related to one other and must be continuous—it even discussed them extensively in its alternative argument supporting the RICO conviction. *See* 492 U.S. at 239, 109 S.Ct. at 2900 ("[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related. . . ."); *id.* at 238, 109 S.Ct. at 2900 ("Section 1961(5) concerns only the minimum number of predicates necessary to establish a pattern; and it assumes that there is something to a RICO pattern beyond simply the number of predicate acts involved."); *cf. United States v. Alexander*, 888 F.2d 777, 778 (11th Cir.1989) (considering anew, on remand from the Supreme Court for consideration in light of *H.J., Inc.*, whether two predicate acts were sufficiently continuous and related to establish a pattern where other

predicate acts had been invalidated on appeal), *on remand from* 492 U.S. 915, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989). Furthermore, "[it] is by now well established that in order to prove a 'pattern of racketeering activity' it is not sufficient to simply establish two isolated predicate acts." *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1264 (11th Cir.2004). *Thus, Peacock* and Pepe are irrelevant to our discussion here.

Continuity of racketeering activity may be proven "in a variety of ways," "depend[ing] on the specific facts of each case." *H.J., Inc.*, 492 U.S. at 241-42, 109 S.Ct. at 2902. In spite of the case-specific nature of the continuity inquiry, certain general principles guide the analysis. Continuity "is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241, 109 S.Ct. at 2902. "A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." *Id.* at 242, 109 S.Ct. at 2902. Predicate acts "extending over a few weeks or months and threatening no future criminal conduct" do not suffice. *See id.* at 242, 109 S.Ct. at 2902; *Jackson v. BellSouth Telecomms.*, 372 F.3d at 1265-66.

By contrast, the "open-ended" theory of continuity relies not on a closed set of repeated prior acts committed over a substantial period of time, but instead on the "*threat* of continuity" extending into the future. *See Jackson v. BellSouth Telecomms.*, 372 F.3d at 1265.

The burden under this theory can be met by proof that (1) the "racketeering acts themselves include a specific threat of repetition extending indefinitely into the future," or (2) the predicate offenses are "part of an ongoing entity's regular way of doing business," including where "the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." *See H.J., Inc.*, 492 U.S. at 242-43, 109 S.Ct. at 2902; *Jackson v. BellSouth Telecomms.*, 372 F.3d at 1265. Unlike under the "closed period" theory, continuity may be established under the "open-ended" theory "[t]hough the number of related predicates involved may be small and they may occur close together in time." *H.J., Inc.*, 492 U.S. at 242, 109 S.Ct. at 2902; *see also To*, 144 F.3d at 747 (affirming RICO substantive and conspiracy convictions where the evidence was sufficient to show that the defendant committed three predicate acts, all within a span of several hours).

Given that the jury returned a guilty verdict on the substantive RICO count, we know it must have found continuity in the pattern of racketeering activity. The instruction given to the jury on that count mirrored the Eleventh Circuit pattern instruction, which we have previously held to be sufficient on the issue of continuity, *United States v. Kotvas*, 941 F.2d 1141, 1144 (11th Cir.1991), and Browne does not contest the instruction here. Because the special verdict form did not require any specific findings on continuity, however, Browne argues that we would be blindly guessing what the jury relied upon in making its finding. But neither our inquiry

on appellate review, nor the district court's task in considering a motion for judgment of acquittal, requires us to determine the specific underlying basis of the jury's finding on continuity.

Browne's continuity argument goes astray in its focus on the jury outcomes regarding individual predicate acts. Any two predicate acts can be sufficient for the jury to find continuity. *See Starrett*, 55 F.3d at 1545 ("[I]f any two of Nolan's thirty-four predicate acts establish the required RICO elements, then Nolan's RICO conviction is due to be affirmed."); *United States v. Church*, 955 F.2d 688, 694 (11th Cir.1992) (rejecting a sufficiency of evidence challenge where exactly two predicate acts were available to support the continuity requirement); *Alexander*, 888 F.2d at 778 (same); *cf.* 18 U.S.C. § 1961(5) (" '[P]attern of racketeering activity' requires at least two acts. . . ."). Of course the jury may find, in a given case, that the Government has proven more than two predicate acts, and the jury in such a case may rely on all the proven predicate acts to find continuity sufficient to establish a pattern. The same jury theoretically might also, consistent with the minimum requirements of the statute and *H.J., Inc.*, find that multiple predicate acts were proven beyond a reasonable doubt, go on to find unanimously that the evidence proving just two of the acts also fulfills the continuity requirement, and stop its inquiry there. In this latter scenario, the jury has not considered whether every proven predicate act supports a finding of continuity, but nothing further is required so long as at least two acts fulfill the requirement. In most, if not all,

cases, the jury will have no occasion to explain the specific basis for its finding of continuity. Even in the instant case, in which the jury made specific findings on each predicate act via a special verdict form, the finding of continuity can only be inferred from the eventual guilty verdict on Count 2 issued by a properly instructed jury. The jury's decisions on individual predicate acts indicate nothing about its finding of continuity. In this regard, the jury's finding of continuity is, with regard to that limited issue, much like a general verdict. The jury may have relied on any two of the proven predicate acts, or more, in finding continuity, but it will not have indicated which specific acts formed the basis for its decision.

In such situations, our analysis is guided by *Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). *Griffin* involved a conspiracy charge alleging two factually distinct objects of the conspiracy in the same count of the indictment. *Id.* at 47, 112 S.Ct. at 468. At trial, the evidence against Griffin only connected her to one of the two alleged objects, but the jury convicted her of the conspiracy count by general verdict after being instructed that it could find guilt upon proof of either object. *Id.* at 47-48, 112 S.Ct. at 468. The Supreme Court affirmed the conviction, noting the rule at common law that "a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." *Id.* at 49, 112 S.Ct. at 469. The Court distinguished prior decisions reversing general verdicts

on counts based on alternate grounds when one of the possible grounds was later revealed to be either constitutionally or legally flawed, as opposed to being "merely unsupported by sufficient evidence." *Id.* at 56, 112 S.Ct. at 472. In the latter type of case, "the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Id.* at 56-57, 112 S.Ct. at 473 (citation omitted). Although a jury, in its limited role as factfinder, cannot be trusted to identify and discount "a legally insufficient theory" as a basis for a verdict, "[q]uite the opposite is true . . . when [jurors] have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence" and are presumed not to rely upon theories that are not adequately proven. *Id.* at 59-60, 112 S.Ct. at 474.

We have never applied *Griffin* in this particular RICO context, but we see no reason why its rationale does not apply here. *See United States v. Vastola*, 989 F.2d 1318, 1330 (3d Cir.1993) (holding, in a similar RICO case, that "[t]he rationale of *Griffin* directly applies"). Browne challenges the jury's ultimate finding of continuity under the substantive RICO count on the basis of the presumptive evidentiary insufficiency of certain predicate acts and the court's inability to determine whether the jury relied on any of those factually insufficient predicate acts. But because any combination of two factually sufficient predicate acts can support a finding of continuity, that finding—and thus the substantive RICO conviction—may stand "if the evidence is sufficient with respect to any [two] of the

acts charged." *See Griffin*, 502 U.S. at 56-57, 112 S.Ct. at 473. Reversal of either a jury's finding of continuity or a conviction on a substantive RICO count is not required simply because some predicate acts are factually insufficient, as long as there remain at least two adequately proven acts.

This rule takes further support from the notion that courts must be cognizant not to impinge upon the jury's factfinding role when reviewing the sufficiency of evidence. The nature of the review recognizes "the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts," preserving that role "through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Ultimately, then, our review for sufficiency of the evidence "is of course wholly unrelated to the question of how rationally the verdict was actually reached. . . . [I]t does not require scrutiny of the reasoning process actually used by the factfinder—if known." *Id.* at 319 n. 13, 99 S.Ct. at 2789 n. 13; *cf. Schlup v. Delo*, 513 U.S. 298, 330, 115 S.Ct. 851, 868-69, 130 L.Ed.2d 808 (1995) (observing that, under *Jackson v. Virginia*, review for sufficiency of the evidence requires not "what reasonable triers of fact are likely to do," but "whether the trier of fact has power to make a finding of guilt . . . as a matter of law. . . . [T]he mere existence of sufficient evidence to convict would be determinative. . . ."). Sufficiency review operates as a

backstop to protect the defendant's due process rights, not as a license for the court to second-guess the jury. *See Jackson v. Va.*, 443 U.S. at 319, 99 S.Ct. at 2789. Upon a sufficiency challenge, the court must determine only whether, on the basis of the proof adduced by the Government, a jury could rationally have reached a verdict of guilty beyond a reasonable doubt. Whether the jury actually chose an available, rational result over an irrational alternative is ultimately beyond the court's power to police, but we presume that juries do not make irrational choices when presented with options supported by evidence. *See id.* at 319 n. 13, 99 S.Ct. at 2789 n. 13.

In light of these principles, we cannot accept Browne's suggestion that we adopt the reasoning of the Second Circuit in *Delano*. That case is unpersuasive because it would require unwarranted speculation into the jury's decisionmaking. The court states that it must decide whether, without the invalidated predicate acts, "the jury nonetheless *would have found* that Delano committed . . . a pattern of racketeering activity." *Delano*, 55 F.3d at 728 (emphasis added). We disagree with that premise; as *Jackson* makes clear, the question should be whether a rational jury could have found that the pattern requirements were met. *See* 443 U.S. at 319 n. 13, 99 S.Ct. at 2789 n. 13. Neither *Delano*, nor the sole case on which it relies, *United States v. Biaggi*, 909 F.2d 662, 692-93 (2d Cir.1990), provides any authority for the proposition that a court must reverse a RICO conviction whenever the jury might (or might not) have based its pattern finding on predicate acts later

determined to be insufficient. *See United States v. Edwards*, 303 F.3d 606, 642 (5th Cir.2002). In any event, *Delano*'s holding applies, at most, to cases in which the invalidated predicate acts dominate the RICO prosecution. *See United States v. Dhinsa*, 243 F.3d 635, 670 (2d Cir.2001). Instead, we favor the approach of the Third Circuit in *United States v. Vastola*, where the court rejected "speculations about the jury's rational deliberation process" and independently determined that there was sufficient evidence of at least two predicate acts to support a substantive RICO conviction, even though it was impossible to determine from the verdict whether the jury actually found more than one predicate act. 989 F.2d at 1331.

Upon our independent review, we have no trouble concluding that the Government adduced sufficient evidence for a rational jury to find continuity among at least two predicate acts. Predicate Act 1 was based upon evidence that from 1993 through 1998, Browne accepted $254,000 from Hvide while also employed by D1-MEBA and NFOPAPE. Pursuant to a written "consultation" agreement that was charged to the Port Everglades Towing division of Hvide, Browne was compensated for his consulting work at the rate of $1,500 per month from October 1993 through January 1994, and $2,000 per month thereafter. Browne's retainer was raised to $3,500 per month in March 1994 and to $5,000 per month in May 1994. He continued to receive $5,000 per month until January 1997, when his retainer was lowered to $4,000 per month. His contract was terminated in October 1998 as a result of the Government's criminal investigation.

Appendix A

Predicate Act 13 charged Browne with mail fraud. In 1995, a Florida state legislator, Ron Greenstein, sought Browne's advice in assisting a vision insurance company in its proposal to cover local government employees. The proposed vision plan had nothing to do with union business. The Government introduced vouchers that Browne, or others at his direction, submitted expense vouchers for the reimbursement of expensive meals and airplane tickets purchased in November 1995, January 1996, and February 1996. These expenses related to Greenstein's proposed vision plan, not to union business.

Predicate Act 14 also concerned mail fraud. The Government adduced evidence that Browne frequently submitted vouchers prepared by himself or Devaney for the reimbursement of meals with family or friends that were unrelated to union business, or that he submitted vouchers for reimbursement of meals that had been paid for by union employees at his direction. The dates of the vouchers for which Browne was found guilty of mail fraud spanned six years: July 8, 1993; October 27, 1993; March 25, 1994; May 2, 1994; August 13, 1994; January 7, 1996; June 17, 1996; June 18, 1996; October 19, 1996; December 31, 1996; July 7, 1997; November 28, 1997; and December 3, 1997.

Predicate Acts 1, 13, and 14 satisfy the continuity requirement of the pattern component. We have previously affirmed a district court's dismissal of a plaintiff's substantive racketeering claims where the alleged racketeering activities pertained to the

settlement of a single lawsuit, not a series of lawsuits, over a nine-month period of time. *Jackson v. BellSouth Telecomms.*, 372 F.3d at 1267 (affirming dismissal "[i]n view of the narrow scope of the alleged racketeering activity and the limited time frame in which it is said to have taken place"). Unlike that case, Predicate Acts 1, 13, and 14 constitute a "series of related predicates extending over a substantial period of time"—namely, from 1993 to 1998—and thus satisfy closed-ended continuity. *See H.J. Inc.*, 492 U.S. at 242, 109 S.Ct. at 2902. The acts also establish a sufficient threat of repetition to support open-ended continuity. That is, rather than pointing to a "unique, first-time occurrence," the acts were part of the defendants' "regular way of doing business." *See id.* at 1268. We therefore find that the Government's evidence was sufficient to establish continuity for purposes of the pattern component.

2.

Browne similarly argues that his conviction for the RICO conspiracy count, Count 1, must be reversed because the jury's conspiracy verdict did not identify the acts upon which was the conviction was based. Accordingly, he contends, the jury may have relied upon the Taft-Hartley charges in convicting him. As we have declined to adopt the reasoning of *Delano*, and we find sufficient evidence in the trial record that supports the Count 1 conviction, even assuming that Predicate Acts 2 and 4 of Count 2 fail, we affirm Browne's conviction.

Because there are fewer proof requirements under § 1962(d) than under the substantive RICO offenses—most notably, through the absence of the requirement of an overt act—the conspiracy offense reaches a wider range of conduct. *See United States v. Harriston*, 329 F.3d 779, 785 (11th Cir.2003). A defendant may be guilty of conspiracy even if he did not commit the substantive acts that could constitute violations of §§ 1962(a), (b), or (c). *United States v. Alonso*, 740 F.2d 862, 871-72 (11th Cir.1984). The touchstone of liability is an agreement to participate in a RICO conspiracy, which may be shown in two ways: (1) showing an agreement on the overall objective of the conspiracy, or (2) showing that a defendant agreed to commit personally two predicate acts, thereby agreeing to participate in a "single objective." *United States v. Abbell*, 271 F.3d 1286, 1299 (11th Cir.2001). "If the government can prove an agreement on an overall objective, it need not prove a defendant personally agreed to commit two predicate acts." *Id.* In the absence of direct evidence of an agreement on an overall objective, the Government may prove such an agreement through "inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme," *United States v. Silvestri*, 409 F.3d 1311, 1328 (11th Cir.2005) (internal quotation marks and citation omitted), amounting to evidence that each defendant necessarily must have known that the others were also conspiring to participate in the same enterprise through a pattern of racketeering. *United States v. Castro*, 89 F.3d 1443, 1451 (11th Cir.1996).

Appendix A

Browne asserts that the Government's case was not based on an agreement on an "overall objective," but instead focused on proving an agreement to commit personally two predicate acts, as to which the evidence is insufficient. The Government responds that the evidence is sufficient to sustain Browne's conviction under either theory. Because we find that the Government presented sufficient circumstantial evidence that Browne agreed to the overall objective of the enterprise—i.e., to control the financial affairs of the union and misuse its assets and influence for personal gain—we do not reach the question whether the evidence was sufficient to convict Browne based on a "single objective" theory.

Browne was executive director of D1-MEBA, president of NFOPAPE, and divisional director of the Federation of Public Employees. While serving in those positions, Browne placed his sister, Devaney, in charge of handling division finances at D1-MEBA/FOPE and made her the de facto secretary/treasurer of NFOPAPE and the Federation of Public Employees. Devaney processed the expense vouchers submitted by Browne and others at Browne's direction, which claimed reimbursement for non-union expenses and contained other false information. Many of these expenditures were without supporting documentation, as required under the LMRDA. Devaney also purchased airplane tickets for personal trips to New York City that she charged to Browne's union credit card.

In 1995, NFOPAPE organizer Rumsby twice asked Browne for permission to organize the employees of Paramount Vending Company. Browne instructed him not to "mess with this company," because they were a "friend or a friend of a friend." In addition, from 1993 to 1998, Browne accepted $254,000 from Hvide, an employer whose employees D1-MEBA and NFOPAPE would have admitted to membership. For his receipt of that money, Browne was required to submit to the Office of Labor Management Standards a Labor Organization Officer and Employee Report, or LM-30, a public document reporting the receipt of anything of value from an employer.[26] In addition, local ordinance required Browne to file lobbying registration forms and annual expenditure statements.[27] Browne failed to file either the LM-30 forms or the required lobbying forms with respect to the money he received from Hvide.

Testimony also demonstrated how Browne concealed the affairs of the enterprise from discovery. In 1996, Browne refused to permit D1-MEBA officials to audit the books and records of NFOPAPE, even when he knew it would lead to the loss of his position at D1-MEBA/FOPE. In addition, Browne did nothing in response to Carrillo's suspicions that Devaney was improperly

26. *See* 29 U.S.C. § 432; 29 C.F.R. § 404.3.

27. Section 1-262 of the Broward County Code then in effect required any person communicating directly with any county commissioner for the purpose of influencing legislation to file registration forms with the county administrator, as well as an annual statement listing all lobbying expenditures and the sources that funded such expenditures.

handling the union's finances. Browne and Devaney together deflected Zakaib's requests for access to the union's books and records, and disregarded the financial advice of NFOPAPE's accountants to establish internal controls over the accounting functions of the union. In 1999, Browne failed to take prompt measures upon learning of Devaney's payroll theft from Lambert, and the embezzlement continued for an additional six months. A jury could infer from these facts that there was an agreement on the overall objective charged in the indictment. Accordingly, we affirm Browne's conviction on Count 1.

3.

Browne's final sufficiency challenge contends that there was insufficient evidence to support his conviction for honest services mail fraud, Count 7. Browne raises no specific challenges to his conviction. Instead, he argues more broadly that, because the evidence does not support the three Taft-Hartley predicate acts of which he was convicted, the evidence is insufficient to support Count 7. To the extent that we have already rejected Browne's challenge to Count 3/Predicate Act 1, Browne's argument fails on its own terms. More fundamentally, however, Browne's efforts to portray Count 7 as merely a "kitchen-sink" approach to capturing the conduct underlying the Taft-Hartley counts is misguided. Honest services mail fraud constitutes a crime that is distinct from a violation of the Taft-Hartley Act, and reaches conduct that is not necessarily a violation of the Taft-Hartley Act. Here, we have little difficulty concluding

that the evidence adduced at trial was sufficient for a reasonable jury to convict Browne of honest services mail fraud.

Count 7 alleged use of the mails in furtherance of a scheme to defraud D1-MEBA and NFOPAPE of Browne's honest services. To prove "honest services" mail fraud, the Government must show that the accused intentionally participated in a scheme or artifice to deprive the persons or entity to which the defendant owed a fiduciary duty of the intangible right of honest services, and used the United States mails to carry out that scheme or artifice. *See* 18 U.S.C. § 1346 (predicating a mail fraud prosecution on a "scheme or artifice to deprive another of the intangible right of honest services"); *United States v. Hooshmand*, 931 F.2d 725, 731 (11th Cir.1991) (defining elements of mail fraud). We have also held that a defendant's non-action or non-disclosure of material facts intended to create a false and fraudulent representation may constitute a violation of the mail fraud statute where the defendant had a duty, explicit or implicit, to disclose material information. *United States v. Waymer*, 55 F.3d 564, 571 (11th Cir.1995).

Federal law imposes fiduciary responsibility upon labor union officials. *United States v. Rodrigues*, 237 Fed.Appx. 178, 180 (9th Cir.2007) (mem.); *United States v. Boffa*, 688 F.2d 919, 930-31 (3d Cir.1982) ("[T]he LMDRA [sic] established, as a matter of federal law, union members' right to the honest and faithful services of union officials."). Contrary to the Taft Hartley Act's focus upon a union official's receipt of money or a thing

of value from an employer, § 501(a) of the Labor Management Reporting and Disclosure Act "imposes fiduciary responsibility in its broadest sense, and is not confined to financial dealings by union official"; union members are owed "the loyal, faithful, and honest services of their union official." *See Boffa*, 688 F.2d at 930-31. Specifically, § 501(a) includes, *inter alia*, the requirements that a union official must refrain from dealing with the labor organization as an adverse party, and must account to the labor organization for certain profits received by him.[28]

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28. In pertinent part, 29 U.S.C. § 501(a) provides that:

> The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. . . .

There was sufficient evidence at trial to establish the elements of the crime. Contrary to Browne's claim that there was insufficient evidence of conduct on which honest services mail fraud could be based, a reasonable jury could have concluded beyond a reasonable doubt that Browne violated his fiduciary duties to the union and its members based on evidence that Browne received monetary payments through the United States mails from Hvide, whose employees D1-MEBA and NFOPAPE would have admitted to membership; failed to disclose such payments to the union and on LM-30 forms; and failed to file lobbying registration statements in Broward County. We have already rejected Browne's argument that Delano requires reversal based on the theoretical possibility that the jury may have relied on Predicate Acts 2 (pertaining to Coastal Gaming) and 4 (pertaining to Coleary Transport) of Count 2 in convicting Browne of Count 7. Because Browne raises no further challenges, we affirm Browne's conviction of honest services mail fraud.

C.

Having determined that Browne's sufficiency challenges fail, we turn to his challenge to the jury instruction. He claims that the district court should have charged the jury on the exclusion of supervisors from the term "employees" under the statute. In his proposed instructions, Browne proposed a one-sentence addition to the court's proposed instruction on the elements of the Taft-Hartley counts. The sentence would have simply stated that "employees" do not include supervisors. At

the charge conference, Browne against requested this instruction and was denied. Browne argues that the refusal infected Count 3/Predicate Act 1 (pertaining to Hvide) and Predicate Act 2 (pertaining to Coastal Gaming). As we have already explained *supra*, reversal of the jury's findings on Predicate Act 2 would not affect any of the substantive counts of the indictment on which Browne was convicted; thus, we are concerned only with Count 3/Predicate Act 1.

We review jury instructions de novo to determine whether they misstate the law or mislead the jury to the objecting party's prejudice. *United States v. Hansen*, 262 F.3d 1217, 1248 (11th Cir.2001) (per curiam). If the instructions accurately state the law, the trial judge has wide discretion to determine their style and wording. *United States v. Kenney*, 185 F.3d 1217, 1222-23 (11th Cir.1999) (per curiam).[29]

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29. The parties' briefs state that Browne's challenge to the district court's jury instruction is subject to abuse-of-discretion review. We disagree. Browne did not propose a proper theory-of-defense instruction, but instead proposed an addition to the court's instruction on the elements that would have excluded supervisors from the definition of "employees." The court otherwise gave no instruction defining the term. This is more akin to a failure by the district court to instruct on one element of an offense than a failure to explain a specific defense theory, and is therefore subject to de novo review.

Even if we were to apply the abuse-of-discretion standard, however, it would not alter the outcome. Our circuit uniformly finds an abuse of discretion where a district court "applies an

(Cont'd)

Again assuming that Browne correctly asserts that the supervisory exclusion applies to § 186, it follows that the district court erred in declining to advise the jury of that definition and that Browne's proposed jury charge accurately recited the law. It does not automatically follow, however, that the district court's failure

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(Cont'd)
incorrect legal standard [or] follows improper procedures in making the determination." *Burr & Forman v. Blair*, 470 F.3d 1019, 1030 n. 31 (11th Cir.2006); *Klay v. Humana, Inc.*, 382 F.3d 1241, 1251 (11th Cir.2004); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir.2001) (per curiam). In other words, as articulated by the Supreme Court, "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996), *superseded by statute on other grounds as noted in United States v. Mandhai*, 375 F.3d 1243, 1249 (11th Cir.2004); *id.* ("The abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions."); *see Young v. New Process Steel, LP*, 419 F.3d 1201, 1203 (11th Cir.2005) ("[The] limited standard [of abuse of discretion] does not mean much in this case, which turns on a pure law issue. . . . We decide pure law issues de novo, which is another way of saying that a ruling based on an error of law is an abuse of discretion." (citations omitted)). We therefore follow the Supreme Court's lead in determining that "[l]ittle turns . . . on whether we label review of this particular question abuse of discretion or de novo, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Koon*, 518 U.S. at 100, 116 S.Ct. at 2047-48; *see United States v. Barner*, 441 F.3d 1310, 1315 n. 5 (11th Cir.2006) ("The disagreement [over which standard of review to apply in prosecutorial vindictiveness cases] is perhaps more apparent than real, for even under an abuse of discretion standard, errors of law receive no deference.").

constituted reversible error. A district court's failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-error analysis. *See Mitchell v. Esparza*, 540 U.S. 12, 16, 124 S.Ct. 7,10, 157 L.Ed.2d 263 (2003); *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 1833 144 L.Ed.2d 35 (1999) ("[A]n instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence."). The correct focus of harmless-error analysis is whether it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty in the absence of the error. Put another way, the focus is whether "the jury verdict would have been the same absent the error" or "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *See Neder*, 527 U.S. at 17, 19, 119 S.Ct. at 1837, 1839.

It is clear beyond reasonable doubt that, even assuming the supervisory exclusion applies to § 186, the failure to instruct the jury that the definition of "employees" excludes supervisors was harmless error. With respect to the Hvide charge, the evidence adduced at trial covered a significantly broader range of employees than merely supervisors. At trial, the Government presented overwhelming evidence that not all licensed seamen are considered "supervisors" for purposes of collective bargaining; that D1-MEBA and NFOPAPE represented non-supervisory employees; and that Hvide employed both licensed and unlicensed seamen on its existing ships and also employed workers

in its offshore division that were of the precise type of workers that were already organized by D1-MEBA and NFOPAPE. Additional testimony established that D1-MEBA and NFOPAPE actively organized to increase their job base and ensure their survival. With or without Browne's proposed instruction, we have no reasonable doubt that the jury would have reached the same conclusion that D1-MEBA and NFOPAPE would have sought to organize Hvide's employees, and thus conclude that even if the district court's instruction on an element of § 186(a)(2) was erroneous, any such error was harmless and does not entitle Browne to a new trial.

IV.

Browne contends that the district court erred by denying his motion, made pursuant to Federal Rule of Criminal Procedure 14, to sever his trial from that of Devaney. We disagree. It is well settled that defendants who are indicted together are usually tried together. *Zafiro v. United States*, 506 U.S. 534, 537-38, 113 S.Ct. 933, 937, 122 L.Ed.2d 317 (1993) ("There is a preference in the federal system for joint trials of defendants who are indicted together."); *United States v. Magdaniel-Mora*, 746 F.2d 715, 718 (11th Cir.1984) ("To repeat the familiar, persons indicted together ordinarily should be tried together."). This is particularly true in conspiracy cases. *United States v. Baker*, 432 F.3d 1189, 1236 (11th Cir.2005); *see also United States v. Beale*, 921 F.2d 1412, 1428 (11th Cir.1991) ("The general rule is that defendants charged with a common conspiracy should be tried together."). Therefore, we are generally reluctant to

second-guess the district court's decision on severance. *Baker*, 432 F.3d at 1236. We review the district court's denial of Browne's motion to sever for abuse of discretion; to show such an abuse, Browne must discharge the " 'heavy burden' of demonstrating 'compelling prejudice' from the joinder." *United States v. Novaton*, 271 F.3d 968, 989 (11th Cir.2001) (quoting *United States v. Pepe*, 747 F.2d 632, 651 (11th Cir.1984)).

In *Zafiro v. United States*, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317, the Supreme Court set forth a two-step test to determine "whether a defendant is entitled to a new trial due to a district court's refusal to sever prior to trial or to grant a mistrial once trial has commenced." *United States v. Blankenship*, 382 F.3d 1110, 1122 (11th Cir.2004). A defendant must first demonstrate that the joint trial resulted in prejudice to him; and second, must show that severance is the proper remedy for that prejudice. *Id.* at 1122; *see also Zafiro*, 506 U.S. at 538-39, 113 S.Ct. at 938 ("Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion."). Under this test, "[t]here are only two circumstances in which severance is the only permissible remedy": where there is a serious risk that a joint trial (1) "would compromise a specific trial right of one of the defendants," or (2) would "prevent the jury from making a reliable judgment about guilt or innocence." *Blankenship*, 382 F.3d at 1122-23 (quoting *Zafiro*, 506 U.S. at 539, 113 S.Ct. at 938).

Browne claims that severance would have permitted him to call Devaney as a defense witness offering exculpatory testimony, whereas Devaney refused to testify in a joint trial. Therefore, Browne asserts that his motion for severance falls under the second category, which includes prejudice resulting "if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." *Zafiro*, 506 U.S. at 539, 113 S.Ct. at 938.

This circuit's framework for analyzing a motion to sever based on the desire to offer the exculpatory testimony of a co-defendant is well established. The defendant must first demonstrate: "(1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and effect of the desired testimony; and (4) that the codefendant would indeed have testified at a separate trial." *United States v. Cobb*, 185 F.3d 1193, 1197 (11th Cir.1999). Once the defendant makes that threshold showing, the court must then: "(1) examine the significance of the testimony in relation to the defendant's theory of the case; (2) assess the extent of prejudice caused by the absence of the testimony; (3) consider judicial administration and economy; and (4) give weight to the timeliness of the motion." *Baker*, 432 F.3d at 1239.

We find no abuse of discretion in the district court's denials of Browne's motions for severance based on the court's application of this framework. In his first pretrial motion to sever, Browne alleged that if called to testify at a separate trial, Devaney would testify that Browne

did not knowingly charge personal expenses on the union credit card, never instructed or directed her to falsify expense vouchers, and never discussed the submission of false expense vouchers; that she voluntarily fabricated names on dinner vouchers as a matter of convenience; and that Browne "always assumed that she was completing these vouchers correctly." Further, Browne would only use the union cell phone and calling card to make personal calls "simply as a matter of convenience." She would also testify that she told Browne that her New York trips were related to union business, she never told him that she took her daughter, and she charged her tickets to the union credit card. Finally, she would testify that she "took every possible precaution to conceal her crimes" in order to avoid detection; that her crimes were caused by her depression, alcohol abuse, gambling addiction, and failed marriage; that she did not conspire in any manner with Browne; and that she has no evidence or reason to believe that Browne knew she was victimizing the union.

The district court adopted the magistrate judge's report and recommendation to deny the motion for severance. That report found that "the proffered testimony contains few specific exonerative facts and consists of undocumented conclusory allegations which mitigates against Browne's severance motion"; that such conclusory allegations were further "subject to substantial and damaging impeachment"; and that Browne failed to produce an affidavit from Devaney attesting that she would in fact testify at a separate trial.

Six months later, Browne filed a renewed motion for severance, claiming to have cured the deficiencies by having attached an affidavit from Devaney that was entirely consistent with the description of her proffered testimony in Browne's original motion. The district court denied the motion, noting that it was "troubled by Defendant Browne's inference that the lack of an affidavit was the sole ground for the denial of his original motion. A cursory review of [the magistrate judge's] Report and Recommendation plainly reveals a number of other grounds why the motion was denied."

In his post-trial motion, Browne moved for a new trial based on these previous denials. The court renewed its prior holdings and noted further that Browne failed to show "actual, compelling prejudice" from the denial of severance because the proffered testimony "was, in fact, elicited from other witnesses at trial, such that the jury considered these allegations and rejected them."

On appeal, Browne likens Devaney's proffered testimony to that of the co-defendants in *Tifford v. Wainwright*, 588 F.2d 954 (5th Cir.1979), and *Cobb*, 185 F.3d at 1193. We disagree. Tifford was an attorney who filed a petition for a writ of habeas corpus contending that the Florida state courts had denied him due process by refusing to sever his trial from that of his co-defendants, one of whom was his client. All had been charged in connection with a scheme to cash forged checks. *Tifford*, 588 F.2d at 955. Tifford asserted that his co-defendants would testify in a separate trial that he had no knowledge of the scheme. *Id.* at 957. The Fifth

Circuit noted that the requirements for severance had been met, including the facts that prejudice resulting from the denial of Tifford's motion was "conclusively established" and that the proffered testimony was essential to rebut the prosecution's proof on the crucial issue of Tifford's knowledge of the criminal activities. *Id.*

Though it is difficult to discern much of the court's reasoning from its mostly conclusory per curiam opinion, *Tifford* does not compel a finding of abuse of discretion here. "This Court's cases addressing severance motions have often looked hard at the substance of the affidavits proffered by the co-defendant who purportedly would testify in a separate trial." *Novaton*, 271 F.3d at 989. "Credibility is for the jury, but the judge is not required to sever on patent fabrications. If the testimony is purely cumulative, or of negligible weight or probative value, the court is not required to sever." *Byrd v. Wainwright*, 428 F.2d 1017, 1021 (5th Cir.1970). The court in *Tifford* was plainly satisfied with the substance, exculpatory effect, and other features of the proffered testimony. Not so with respect to Devaney's affidavit, which we agree amounts to undocumented conclusory allegations subject to substantial and damaging impeachment. Furthermore, we note that Devaney's testimony was in no way contrary to her own interests; one of her goals in this appeal is "to clear her name as to the RICO charges," which would be served by the proffered testimony that Devaney acted entirely of her own volition and was not involved in a conspiracy with Browne. Such testimony is "more self-exonerating than exculpatory of [Browne]," is

"completely self-serving and thus lack[s] strong credibility." *Pepe*, 747 F.2d at 651; *see also Novaton*, 271 F.3d at 990 ("[S]tatements concerning the testimony that would become available by severing trials must be specific and exonerative, rather than conclusory or self-serving, in order to justify severance.").[30]

Nor does Browne's proffered testimony resemble that in *Cobb*. The court in *Cobb* noted that it was dealing

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30. Browne also cites to *United States v. DiBernardo*, 880 F.2d 1216 (11th Cir.1989), which we find unavailing. In that case, the Government appealed the decision of the district court to grant defendants a new trial based on the view that the court had erred when it severed the trial of a co-defendant. *Id.* at 1222. On appeal, the court found that the motion to sever was properly granted. *Id.* at 1229. One of the co-defendants, D'Apice, would have testified that the other defendants were not involved in a conspiracy to distribute pornography with him and that they had no knowledge of the criminal activities. *Id.* at 1228. Citing *Tifford*, the court noted the central role occupied by D'Apice's proffered testimony and that the "proposed testimony strongly indicated that D'Apice was the only person involved in certain aspects." *Id.* The court found no reason to disturb the evaluation of a district judge who had evaluated the proposed testimony twice and who was "clearly familiar with the relevant facts on this issue." *Id.* at 1229. *DiBernardo* thus demonstrates that the trial court's decision on a motion to sever is committed to its sound discretion, and an appellate court will generally be reluctant to second-guess that decision. *DiBernardo* also held only that the trial court's decision to sever "was within the trial court's discretion," *id.* at 1228, not that severance was the *only* course of action that would have been proper in those circumstances. *DiBernardo* thus does not necessitate a finding of abuse of discretion here.

with "one of those rare cases" where the defendant's need for the proffered testimony was clear. 185 F.3d at 1197. The "sole evidence" against the defendant on the charge of receiving stolen funds was the testimony of a woman who claimed to have seen the defendant receive the money. *Id.* at 1198. Cobb's proffered testimony came from the only other available person who was present, and would have directly contradicted the only evidence against Cobb. *Id.* By contrast, the Government's evidence against Browne did not hinge on the testimony of a single witness, and as the district court noted in denying Browne's post-trial motion, "the testimony Browne alleges he would have elicited from Devaney was, in fact, elicited from other witnesses at trial."

Moreover, the interests of judicial administration and economy were considerable in this case. Unlike the joint trial in *Cobb*, which "took only one day to complete," *id.* at 1199 ("Trials do not get much shorter than that, so the cost to the system of a severance in this case is minimal."), the trial of Browne and Devaney lasted approximately two months. As in *Novaton*, we find considerations of judicial economy to "weigh[ ] heavily" against severance "in light of the substantial systemic interest in handling this complex, conspiracy case in one trial (which lasted two months)." *Novaton*, 271 F.3d at 990, 991.

We therefore affirm the trial court's denial of severance.

V.

Devaney raises three challenges to her convictions. First, she argues that the Government failed to charge a proper RICO offense,[31] and that therefore, insufficient evidence supported her convictions on Counts 1 and 2. She additionally claims that Count 1 should be vacated due to the insufficiency of evidence supporting the existence of an agreement between Browne and Devaney. Third, she argues that the district court erred by refusing to modify the RICO pattern offense instruction with respect to the fourth element of Count 2. We consider these arguments in turn and conclude that they are without merit.

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31. The Government's argument that Devaney has waived the issue is mistaken, as Devaney's claim alleges that the indictment failed to state an offense—a claim which may be heard at any time while the case is pending—and does not merely allege a defect in the indictment. *See* Fed.R.Crim.P. 12(b)(3). *See United States v. Panarella*, 277 F.3d 678, 685 (3d Cir.2002) (holding that "a charging document fails to state an offense if the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation"). We therefore do not reach the question whether Rule 12(b)(3)'s requirement that defenses or objections based on defects in the indictment must be raised before trial is a "claim-processing rule" susceptible to forfeiture or waiver, or whether it is a jurisdictional bar. *See Bowles v. Russell*, __ U.S. __, 127 S.Ct. 2360, 2365, 168 L.Ed.2d 96 (2007) (noting the "jurisdictional distinction" between procedural rules based on court-promulgated rules and those based on statutes); *Eberhart v. United States*, 546 U.S. 12, 19, 126 S.Ct. 403, 407, 163 L.Ed.2d 14 (2005).

Appendix A

A.

Devaney argues that for purposes of 18 U.S.C. § 1962(c), the Government could not plead and prove that D1-MEBA and NFOPAPE were the "enterprise" with which the defendants were associated and the "victim" of the predicate acts of racketeering. Devaney points to certain statements in *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993), and *National Organization of Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994), for the proposition that while 18 U.S.C. §§ 1962(a) and (b) are concerned with activities that victimize the enterprise, § 1962(c) is limited to proscribing activities that use the enterprise as a "vehicle" to bilk third parties.

Devaney's argument draws heavily from a decision of the Third Circuit, *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir.1995). That case involved a civil RICO action brought by Jaguar automobile corporation against a Jaguar dealership and its owners for defrauding Jaguar of more than a million dollars through the submission of five years' worth of fraudulent warranty claims to Jaguar. *Id.* at 261. The central issue in *Jaguar* Cars was whether the Jaguar dealership was sufficiently distinct from its owners to satisfy the requirement that the "person" associated with the enterprise be distinct from the "enterprise" itself. *Id.* at 260. The court held that the distinctiveness requirement was met by bringing a claim against the

defendant-owners as persons conducting the dealership enterprise through a pattern of racketeering activity. *Id.* at 268. In so holding, the court noted the statement of the *Reves* Court that " 'Congress consistently referred to subsection (c) as prohibiting the *operation* of an enterprise through a pattern of racketeering activity and to subsections (a) and (b) as prohibiting *acquisition* of an enterprise.' " *Id.* at 267 (quoting *Reves*, 507 U.S. at 182, 113 S.Ct. at 1171). The court further observed that the *Scheidler* Court "held that the 'enterprise' in subsection (c) is properly viewed as the 'vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity.' " *Id.* (quoting *Scheidler*, 510 U.S. at 259, 114 S.Ct. at 804). The Third Circuit thus concluded:

> [A] victim corporation "drained of its own money" by pilfering officers and employees could not reasonably be viewed as the enterprise *through* which employee persons carried out their racketeering activity. Rather, in such an instance, the proper enterprise would be the association of employees who are victimizing the corporation, while the victim corporation would not be the enterprise, but instead the § 1962(c) claimant.

Id.

We find this dictum in *Jaguar Cars* to be unpersuasive.[32] Like the district court in *LaSalle Bank Lake View v. Seguban*, 937 F.Supp. 1309 (N.D.Ill.1996), we are of the opinion that the *Scheidler* Court's statement cannot be so construed. In *Scheidler*, the plaintiff-clinics alleged that anti-abortion protesters conspired to conduct the affairs of an enterprise to shut down abortion clinics through a pattern of racketeering activity. *Scheidler*, 510 U.S. at 253, 114 S.Ct. at 801. The issue in Scheidler was whether the alleged enterprise or racketeering acts must have an economic motive. *Id.* at 254, 114 S.Ct. at 802. In holding that an economic motive was unnecessary, the court explained that "the 'enterprise' in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity." *Id.* at 259, 114 S.Ct. at 804 (emphasis added). By so qualifying its language, therefore, the *Scheidler* Court did not foreclose the possibility that the enterprise can also be the victim of the alleged RICO violation. *See also LaSalle Bank Lake View*, 937 F.Supp. at 1323 ("[T]his court does not agree with the leap of logic made by the Third Circuit from the Supreme Court's Scheidler statement that 'enterprises' *'generally' are not* 'victims,' to the conclusion that 'enterprises' *cannot be* 'victims.' ").

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32. Apparently, at least one court within the Third Circuit has chosen to disregard the dictum. *See Polymer Dynamics, Inc. v. Bayer Corp.*, No. CIV. A. 99-4040, 2000 WL 1146622, at *5 (E.D.Pa. Aug.14, 2000) (noting that a "plaintiff also can be an enterprise" and citing cases).

Nor can the selected statement from *Reves* be interpreted to mean that §§ 1962(a) and (b) hold a monopoly on situations where an enterprise has been victimized. The issue in *Reves* was how much involvement in a corporation's affairs an outside accounting firm must have in order to be deemed a participant in the conduct of those affairs. *See Reves*, 507 U.S. at 176-77, 113 S.Ct. at 1168-69. The Court held merely that the defendant "must participate in the operation or management of the enterprise itself." *Id.* at 185, 113 S.Ct. at 1173. The Court's statement that "Congress consistently referred to subsection (c) as prohibiting the operation of an enterprise through a pattern of racketeering activity and to subsections (a) and (b) as prohibiting acquisition of an enterprise,' " *id.* at 182, 113 S.Ct. at 1171, thus underscored the Court's application of an "operation or management" test, not the validity of a victim/vehicle distinction.

Our holding today is consistent with our en banc opinion in *United States v. Goldin Industries, Inc.*, 219 F.3d 1268 (11th Cir.2000), in which we held that in the context of a § 1962(c) charge, the requirement of distinction "between the RICO person and the RICO enterprise is necessary because the enterprise itself can be a passive instrument or victim of the racketeering activity. *See Bennett [v. United States Trust Co. of New York]*, 770 F.2d [308, 315 (2d Cir.1985)] ('Such a distinction focuses the section on the culpable party and recognizes that the enterprise itself is often a passive instrument or victim of the racketeering activity.')." *Id.* at 1270 (emphasis added). We believed then, as we

do now, that "Congress' intention in § 1962(c) to target a specific variety of criminal activity [includes] 'the exploitation and appropriation of legitimate businesses by corrupt individuals,' " not merely the use of an enterprise to swindle third parties. *See Goldin Indus., Inc.*, 219 F.3d at 1270.

Accordingly, Devaney's argument to vacate her convictions on Counts 1 and 2 on this ground is without merit.

B.

Devaney also challenges her conviction on Count 1 on the ground that the Government did not present sufficient evidence of an agreement between Devaney and Browne on the overall objective of the conspiracy or an agreement by Devaney to commit personally two predicate acts. Our review of the evidence in the light most favorable to the Government indicates that there is more than enough evidence in the record to support her conviction beyond a reasonable doubt on the former theory, and we therefore do not reach the latter.

Devaney's insufficiency challenge rests on the flawed argument that the evidence supporting her conspiracy conviction requires "careful parsing" by eliminating the predicate acts found to be committed by Browne alone, the predicate acts found to be committed by herself alone, and the predicate acts that the jury found had not been committed. Having done so, she points to Count 2's Predicate Act 14—mail fraud connected to the

submission of an expense voucher on November 28, 1997—as the only act that the jury found that Browne and Devaney had committed jointly. She argues that based on that act, the evidence is insufficient to show either an agreement on an "overall objective" or the existence of a "single objective" conspiracy.

Devaney's argument fundamentally misconstrues the law and unduly constricts the scope of evidence that may be considered by a jury with respect to a RICO conspiracy charge. First, we note that Count 1 did not incorporate by reference the substantive RICO charge in Count 2. Rather, it alleged a pattern of racketeering activity from 1993 to 2003, consisting of multiple acts including Taft-Hartley violations, embezzlement, bank fraud, and mail fraud. Thus, in proceedings on Count 1, the Government was not limited to proving the specific predicate acts charged in Count 2. Furthermore, Count 1 centered on the act of *agreement*:

> whether or not the jury believed that [the defendant] actually committed the predicate acts has nothing to do with whether the jury believed that he agreed to commit the predicate acts. Agreement to commit two predicate acts, and not the actual commission of two predicate acts, is the key issue in a RICO conspiracy charge.

United States v. Russo, 796 F.2d 1443, 1461 (11th Cir.1986). Accordingly, "the jury was free to consider any act of [the type alleged as racketeering activity in Count

1] that occurred within the time frame of the conspiracy." *United States v. Phillips*, 874 F.2d 123, 127 (3d Cir.1989); *see also United States v. Elliott*, 571 F.2d 880, 911 (5th Cir.1978) ("We have long followed the rule that the government is not limited to overt acts pleaded in the indictment in proving a conspiracy; it may show other acts of the conspirators occurring during the life of the conspiracy.").

Second, the fact that one conspirator may have been unaware of predicate crimes committed by a co-conspirator does not necessarily negate the existence of a conspiracy. Regardless of the method used to establish the agreement, the Government need not prove that each conspirator agreed with every other conspirator, knew of his fellow conspirators, was aware of all of the details of the conspiracy, or contemplated participating in the same crime. *United States v. To*, 144 F.3d 737, 744 (11th Cir.1998); *Castro*, 89 F.3d at 1451 (citing *Pepe*, 747 F.2d at 659-60). "[T]he fact that 'each conspirator may have contemplated participating in different and unrelated crimes is irrelevant.' " *To*, 144 F.3d at 744-45 (quoting *Starrett*, 55 F.3d at 1544).

Contrary to Devaney's argument, therefore, the evidence in support of Count 1's RICO conspiracy charge was not limited to the predicate act that the jury found was jointly committed by Browne and Devaney as the basis of Count 2's substantive RICO violation. Instead, proof of an agreement on an overall objective may be established through sufficient circumstantial evidence from which a rational jury could conclude beyond a

reasonable doubt that Devaney "must necessarily have known" that Browne was also conspiring to participate in the same enterprise through a pattern of racketeering activity. *See Castro*, 89 F.3d at 1451.

Devaney relies heavily on *United States v. Gonzalez*, 921 F.2d 1530 (11th Cir.1991), to argue that there was no evidence that she agreed with Browne as to the overall objective. In *Gonzalez*, Michael Timothy Sweeton was charged with a RICO conspiracy in connection with the LeQuire drug ring which imported cocaine from Colombia to landing strips in Georgia, Alabama, and Tennessee. *Id.* at 1533. Sweeton was a member of a ground crew deployed to a landing site in Sylvania, Georgia, whose job it was to scout the landing area and unload cocaine from an airplane arriving on May 23, 1983. *Id.* at 1533-34. That job went awry, and Sweeton was indicted along with others in the drug ring. Although this court found that there was sufficient evidence to convict Sweeton under a "single objective" theory, we held that there was insufficient evidence of a "wide[r] agreement" by Sweeton to join a conspiracy with an overall objective of violating RICO. *Id.* at 1542-44. We noted that there was no evidence tying Sweeton to any activity of the drug ring other than the Sylvania incident: "no witness could remember seeing Sweeton, or hearing of his name, prior to the news that something had gone wrong at Sylvania. In contrast to the other defendants, he is not seen, or known of, at or around LeQuire's home or [the] fixed base operation." *Id.* at 1542. In those circumstances, therefore, we found proof of an agreement to an overall conspiracy to be lacking.

Appendix A

In contrast to the dearth of evidence with respect to Sweeton, there is ample circumstantial evidence to support a finding that Devaney agreed to the overall objective of the alleged enterprise—namely, to control the financial affairs of the union and misuse its assets and influence for personal gain. Browne hired Devaney to be his administrative assistant, in which capacity she came to wield extraordinary control over the books, records, and finances of the union. With that authority, Devaney was able to enrich herself through her payroll scheme and by charging personal expenses to the union. For his part, Browne was able to use his influence to obtain payments from employers. In addition, Devaney's activities both facilitated Browne's fraudulent expenses and shielded them from view. In filling out Browne's expense vouchers, Devaney admitted to fabricating the names of persons attending dinners and ascribing a union-related purpose to personal meals. Devaney herself attended several expensive dinners that were not related to union business. She also failed to maintain adequate documentation for claimed expenses. Her role thus brought her "squarely within [the alleged] enterprise." *See Gonzalez*, 921 F.2d at 1541. In turn, Browne warded off the complaints of union officials and accountants who expressed concerns over Devaney's performance and criticized the absence of checks and balances over the union's financial affairs. Indeed, when Zakaib repeatedly requested access to the union's books and records, Devaney appealed to Browne to "take care of it."

The sum of this evidence is such that we cannot say that a rational jury could not have found beyond a reasonable doubt that Devaney agreed to the overall objective charged. We therefore affirm Devaney's conviction on Count 1.

C.

Devaney's third argument on appeal is that the district court erred in refusing to modify the pattern RICO jury instruction with respect to the fourth element of the Count 2.[33] The jury was instructed that the fourth element of the substantive RICO offense required finding beyond a reasonable doubt that Devaney "conducted or participated in the conduct of the enterprise's affairs." Over Devaney's objection, the district court delivered the unmodified pattern instruction for this element, which reads:

> [T]he Government must prove beyond a reasonable doubt that the Defendant was something more than an outsider lending aid to the enterprise. It must be proved that the Defendant had some part in either the management or the operation of the affairs of the enterprise itself. Thus, it need not be proved that the Defendant had primary responsibility or even a managerial position;

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33. The *Reves* "operation or management" test is applicable to criminal RICO cases. *Starrett*, 55 F.3d at 1542. However, we have held that the test does not apply to the conspiracy offense, 18 U.S.C. § 1962(d). *Id.* at 1547.

> it is enough if the Defendant was involved in conducting the operation of the affairs of the enterprise as a lower level participant.

Eleventh Circuit Pattern Jury Instruction, Offense Instruction 71.1 (2003).

Devaney has no quarrel with the first two sentences of the pattern instruction, which she admits are lifted directly from the Supreme Court's opinion in *Reves*. Her objection is limited to the second clause of the third sentence. Devaney asked the district court to omit the language that "it is enough if the Defendant was involved in conducting the operation of the affairs of the enterprise as a lower level participant," and to substitute the language: "but the Government must prove beyond a reasonable doubt that the Defendant had some part in directing the enterprise's affairs."

As Devaney's challenge was properly preserved, we review the district court's refusal to accept Devaney's requested modification to the wording of the instruction for an abuse of discretion. *See United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir.2000) ("We review the legal correctness of a jury instruction de novo, but defer on questions of phrasing absent an abuse of discretion.") (internal citation omitted); *United States v. Richardson*, 233 F.3d 1285, 1292 (11th Cir.2000) (" 'The district court has broad discretion in formulating a jury charge so long as the charge as a whole accurately reflects the law and the facts.' ") (quoting *United States v. Turner*, 871 F.2d 1574, 1578 (11th Cir.1989)). A district court's failure to

give a requested jury instruction is an abuse of discretion if the requested instruction "(1) was correct, (2) was not substantially covered by the charge actually given, and (3) dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States v. Eckhardt*, 466 F.3d 938, 947-48 (11th Cir.2006). Under our deferential standard of review, we reverse only if "we are left with a substantial and eradicable doubt as to whether the jury was properly guided in its deliberations." *Id.*

We find no abuse of discretion in the district court's refusal to modify the pattern instruction to incorporate Devaney's proposed language. There can be no doubt that Devaney's proposed instruction was substantially encompassed in the instruction delivered by the district court. The first sentence of the pattern instruction explains that the Government must prove this element beyond a reasonable doubt. The proposed language that a defendant must have "some part in directing the enterprise's affairs" is likewise fully addressed by the second sentence of the pattern instruction, which requires that a defendant must have "some part in either the management *or* the operation of the affairs of the enterprise itself." To manage or operate an enterprise's affairs is to direct the enterprise's affairs. *See Reves*, 507 U.S. at 179, 113 S.Ct. at 1170 ("[B]ut some part in directing the enterprise's affairs is required. The 'operation or management' test expresses this requirement in a formulation that is easy to apply."). Notwithstanding Devaney's semantic preference, to

incorporate Devaney's proposed instruction would be to render redundant the second clause of the third sentence.

The language that Devaney would have stricken is an accurate reflection of the law in this circuit. The reference to "conducting the operation of the affairs of an enterprise as a lower level participant" contained in the second clause of the third sentence closely tracks the *Reves* opinion, which states: "An enterprise is 'operated' not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management." *Reves*, 507 U.S. at 184, 113 S.Ct. at 1173. In *Reves*, the explanation that lower-level participants under the direction of upper management may be found to satisfy the "operation or management" test was necessary to ensure that the Court's finding that the particular outsider in question—*i.e.*, the outside accounting firm—did not operate or manage the enterprise would not unduly restrict the scope of liability for insiders. A defendant must "'knowingly implement[ ]' and 'make' decisions" in order to be liable under the "operation or management" test, *see Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1156 (11th Cir.2006) (quoting *Starrett*, 55 F.3d at 1548), but those actions may be performed under the direction of upper management. *See United States v. Oreto*, 37 F.3d 739, 750-51 (1st Cir.1994) (stating that "[s]pecial care is required in translating *Reves*' concern with 'horizontal' connections—focusing on the liability of an outside adviser—into the 'vertical' question of how far RICO

liability may extend within the enterprise but down the organizational ladder"; that defendants were liable by being "plainly integral to carrying out the [orders from above]"; and that "Congress intended to reach all who participate in the conduct of that enterprise, whether they are generals or foot soldiers").

Because the pattern instruction given by the district court was legally accurate and was more than adequate in addressing Devaney's proposed instruction, Devaney has failed to establish an abuse of discretion.

VI.

With respect to sentencing, Devaney contends that the forfeiture order against her should be vacated for two reasons. First, she argues that the district court should not have adjudged her jointly and severally liable for the full amount of the forfeiture order, and should have reduced the forfeiture amount by the amount of her voluntary restitution. Second, she argues that the order of forfeiture violated the Eighth Amendment's prohibition against excessive fines.

"We review *de novo* the district court's legal conclusions regarding forfeiture and the court's findings of fact for clear error." *Puche*, 350 F.3d at 1153. Whether a forfeiture order is constitutionally excessive under the Eighth Amendment is also subject to *de novo* review. *Id.*

Appendix A

A.

Under 18 U.S.C. § 1963, a trial court must order forfeiture in addition to other penalties for violation of RICO.[34] As individuals convicted under § 1962, Browne and Devaney fall squarely within the forfeiture provision. At sentencing, the district court entered a forfeiture order against the defendants in the amount of $592,254.79, for which they were held jointly and severally liable. This figure was reached by summing the amounts received by Browne from a variety of sources as a result of honest services mail fraud and Taft-Hartley violations ($468,208.52); the amount received by Devaney through payroll embezzlement and bank fraud ($116,207.66); the amount obtained through the submission of fraudulent vouchers ($4,638.82); expenses stemming from Browne's use of the union cell phone and union calling card ($2,471.79); and the amount connected to Devaney's travel to New York ($1,428.00).

Devaney challenges two aspects of the computation of her forfeiture liability. First, she argues that she should not have been held jointly and severally liable for Browne's honest services mail fraud and Taft-Hartley

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34. In this case, forfeiture was ordered pursuant to §§ 1963(a)(1) and (a)(3), which provide in pertinent part that persons convicted of violating § 1962 "shall forfeit to the United States . . . any interest the person has acquired or maintained in violation of section 1962; [and] any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962."

violations because they were not reasonably foreseeable to her. Second, she argues that the forfeiture amount should have been reduced by the $26,500 of voluntary restitution that she made to the union for her payroll embezzlement. We discuss these arguments in turn and conclude that they fail.

We first considered the issue of joint and several liability in the context of a forfeiture order in *United States v. Caporale*, 806 F.2d 1487 (11th Cir.1986). After examining the statutory scheme as a whole and the purpose of the forfeiture provision, we concluded that "imposition of joint and several liability in a forfeiture order upon RICO co-conspirators is not only permissible but necessary in these circumstances to effectuate the purpose of the forfeiture provision." *Id.* at 1506. To saddle the Government with a requirement "to determine the precise allocation of racketeering proceeds" between defendants would substantially impair "the effectiveness of [the] remedy," as "offenders would simply have to mask the allocation of the proceeds to avoid forfeiting them altogether." *Id.* at 1508. It was enough in that case that "the government can prove the amount of the proceeds and identify a finite group of people receiving the proceeds." *Id.* In *Caporale*, therefore, the imposition of joint and several liability as a "collection device" was necessary to effectuate RICO. *Id. Caporale* did not hold, however, that joint and several liability may only be imposed where the Government cannot prove the amount of ill-gotten gains that was funneled to each defendant.

Devaney relies principally upon *United States v. Saccoccia*, 823 F.Supp. 994 (D.R.I.1993), *aff'd*, *United States v. Hurley*, 63 F.3d 1 (1st Cir.1995), to argue that a defendant may not be held liable to forfeit the proceeds of racketeering activity generated by a conspiracy that were not reasonably foreseeable to the defendant. In *Saccoccia*, each defendant was found guilty of a RICO conspiracy violation and one or more related substantive offenses stemming from a conspiracy to launder the proceeds of illegal narcotics sales for a Colombian drug cartel. *Saccoccia*, 823 F.Supp. at 997. In determining the amount of forfeiture to be imposed on each defendant, the district court looked to the Sentencing Guidelines, U.S.S.G. § 1B1.3(a)(1)(B), which require that "both base offense levels and adjustments for specific offense characteristics be determined on the basis of 'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.'" *Id.* at 1004. The court concluded that "[s]ince criminal forfeiture is a form of punishment, it follows that the same principles of sentencing accountability should apply." *Id.* The First Circuit agreed, noting in addition that the same principle underlies established case law holding a defendant substantively liable for the foreseeable criminal conduct of other members of the conspiracy. *Hurley*, 63 F.3d at 22 (citing *Pinkerton v. United States*, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946)). The court decided not "to depart from this principle of attributed conduct when it comes to apply the forfeiture rules, which have aspects both of substantive liability and of penalty." *Id.*

We respectfully disagree with the reasoning of these opinions, as we do not believe that section 1B1.3(a)(1)(B) can be conflated with the Sentencing Guidelines applicable to forfeiture under RICO. The Guidelines expressly deal with forfeiture in section 5E1.4, which provides in its entirety that "[f]orfeiture is to be imposed upon a convicted defendant as provided by statute." U.S.S.G. § 5E1.4. The commentary then lists the various statutes, including 18 U.S.C. § 1962, and notes that forfeiture is mandatory and automatic upon conviction of an underlying offense.

Nor do we believe that the "reasonably foreseeable" limitation operative on the imposition of vicarious *Pinkerton* liability is applicable here. The acts for which Devaney disclaims forfeiture liability are not "merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement." *Pinkerton*, 328 U.S. at 648, 66 S.Ct. 1180. The RICO conspiracy count of which both Browne and Devaney were convicted alleged, *inter alia*, that the defendants agreed to conduct and participate in the conduct of the affairs of the enterprise through a pattern of activity including violations of the Taft-Hartley Act and honest services mail fraud, and one of the multiple objects of the racketeering conspiracy was to use the influence of D1-MEBA, NFOPAPE, and their respective divisions for their personal gain. Accordingly, these offenses were the very objects of the unlawful conspiracy and were committed in furtherance thereof. In that sense, their commission was inherently "reasonably foreseeable" to

Devaney.

The fact that Devaney was not herself charged with the commission of the Taft-Hartley or honest services mail fraud predicate acts does not absolve her of liability for the conspiracy. *Cf. United States v. Faulkner*, 17 F.3d 745, 775 (5th Cir.1994) ("The RICO offense here is not merely the commission of particular predicate acts, but a conspiracy 'to conduct or participate, directly or indirectly, in the conduct of' an enterprise." (quoting 18 U.S.C. § 1962(c))). Although Devaney claims that the district court ruled on her Rule 29 motion for judgment of acquittal that she had not conspired with Browne with respect to the Taft-Hartley and honest services mail fraud violations, our perusal of the trial record reveals otherwise; the court found sufficient evidence to permit the jury to consider this alleged object of the conspiracy, and the jury's verdict found her guilty of so conspiring with Browne. Thus, the money procured through Browne's Taft-Hartley violations and honest services mail fraud was acquired through racketeering activity directly in furtherance of the objects of the conspiracy and was part of the conspiracy's common pool of proceeds. In this respect the conspiracy resembled a partnership in a criminal plan, in whose proceeds Devaney held an interest.

Our finding that forfeiture in this circumstance is not subject to the same "reasonably foreseeable" limitation that operates on vicarious *Pinkerton* liability for the substantive offenses of a co-conspirator is also consistent with our opinion in *Caporale*. In that case,

we noted that the imposition of joint and several liability on a forfeiture was not wholly inconsistent with traditional concepts of criminal law and named *Pinkerton* liability as one example. *Caporale*, 806 F.2d at 1508. However, our discussion did not stop there; we observed that:

> The imposition of joint and several liability on a forfeiture is even less theoretically problematic than vicarious liability for a substantive conviction might be because it goes only to the penalty imposed rather than to the individual's criminal liability. In addition, traditional notions of criminal law are not altogether analogous because RICO itself by design is not traditional criminal law: it represents a radical departure from common law notions of liability and punishment in criminal law in a number of respects.

Id.[35] Indeed, to hold otherwise would be to assign to the Government the onerous task of proving to the trial

35. Devaney urges us that it is "incomprehensible" to "graft a common-law principle of vicarious liability and not the common-law limitation on that liability." We note, however, that the imposition of joint and several liability for a forfeiture order operates as a penalty collection device and not as a theory of substantive liability. *See Caporale*, 806 F.2d at 1508 (noting that forfeiture "goes only to the penalty imposed rather than to the individual's criminal liability"); *see also United States v. Gilbert*, 244 F.3d 888, 924 (11th Cir.2001) ("It is beyond doubt that criminal

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judge which proceeds were reasonably foreseeable to each defendant in a conspiracy. Such a move would significantly blunt the effectiveness of a weapon that Congress specifically authorized "to strike at the heart of an illegal enterprise by confiscating tainted property and proceeds in hopes of putting the criminal enterprise out of business." *See United States v. Gilbert*, 244 F.3d 888, 909 (11th Cir.2001); *see also United States v. Bajakajian*, 524 U.S. 321, 332 n. 7, 118 S.Ct. 2028, 2035, 141 L.Ed.2d 314 (1998) ("It was only in 1970 that Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking.").

Devaney also argues that the amount of forfeiture ought to have been reduced by the two checks totaling $26,500 that she sent to the union after an internal investigation discovered that she had embezzled $116,207.66 from NFOPAPE's payroll. This argument is specious and can be dealt with in short order.

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forfeiture is part of a defendant's sentence"). 18 U.S.C. §§ 1963(a), 3554; *United States v. Bissell*, 866 F.2d 1343, 1349 n. 3 (11th Cir.1989) ("Criminal forfeiture operates in personam against the defendant, serving as a penalty, upon conviction. . . ."); *cf. Hurley*, 63 F.3d at 22 (collecting cases that conclude that forfeiture provisions involve joint and several liability and acknowledging that "[t]his is a somewhat backward way of putting the matter, since 'joint and several' roughly describes the result without explaining the underlying theory of liability"). In this respect, we disagree with *Hurley*'s characterization of forfeiture rules as featuring "aspects both of substantive liability and of penalty," *Hurley*, 63 F.3d at 22.

Restitution pursuant to the Mandatory Victims Restitution Act (MVRA) and forfeiture pursuant to 18 U.S.C. § 1963 are both mandatory in this case, and each serves a different goal.[36] Restitution is to be paid in the full amount of each victim's losses. 18 U.S.C. § 3664(f)(1)(A). At sentencing, the probation officer, who prepared the Presentence Investigation Report, recommended restitution in the amount paid to NFOPAPE by its insurer, $87,100. Presumably, this amount reflected the two checks that Devaney sent to the union.

While the focus of restitution is on the victim, forfeiture focuses on the defendant. In addition to forcing the disgorgement of dishonest profits, therefore, forfeiture is also a punitive action against the defendant. *Caporale*, 806 F.2d at 1507; *see also Libretti v. United States*, 516 U.S. 29, 39, 116 S.Ct. 356, 363, 133 L.Ed.2d 271 (1995) (noting that "Congress conceived of forfeiture as punishment for the commission of various drug and racketeering activities," and it is imposed " 'in addition to any other sentence' " (quoting 18 U.S.C. § 1963)). Devaney's interest in the proceeds of her payroll embezzlement was forfeited and vested in the United States government upon her conviction, but that interest dated back to the time of the act that made the interest

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36. The MVRA provides that restitution will be ordered to any victim for "an offense against property under this title, . . . including any offense committed by fraud or deceit." 18 U.S.C. § 3663A(c)(1)(A)(ii). A victim is defined as any person directly harmed by a defendant's criminal conduct in the course of a scheme, conspiracy, or pattern. 18 U.S.C. § 3663A(a)(2).

subject to forfeiture—in other words, when Devaney embezzled the money from NFOPAPE. *Cf. Gilbert*, 244 F.3d at 903 n. 38 (noting that under the relation back doctrine, "any subsequent transfer of part or all of a defendant's tainted property does not automatically extinguish the government's superior entitlement to the property"). The fact that Devaney subsequently sent $26,500 to the union does not divest the Government of any portion of its interest in the $116,207.66 obtained through the payroll scheme.

Accordingly, Devaney's challenge to the forfeiture order on these grounds fails.

B.

Devaney's last-ditch effort to vacate the forfeiture order rests upon the argument that the inclusion of $468,208.52 received by Browne through the Taft-Hartley and honest services mail fraud violations, as applied to her, constitutes an excessive fine in violation of the Eighth Amendment.

Forfeitures are subject to the Eighth Amendment's prohibition against excessive fines "if they constitute punishment for an offense." *Bajakajian*, 524 U.S. at 328, 118 S.Ct. at 2033. Subject forfeitures violate the Excessive Fines Clause if they are "grossly disproportional to the gravity of the defendant's offense." *Id.* at 337, 118 S.Ct. at 2038. This, in turn, is determined by examining three factors: (1) whether the defendant falls into the class of persons at whom the criminal

statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant. *Id.* at 337-40, 118 S.Ct. at 2038-39.

The forfeiture order in question, which was "imposed at the culmination of a criminal proceeding and require[d] conviction of an underlying felony," *id.* at 328, 118 S.Ct. at 2033, constituted punishment for an offense and was thus a "fine." On the first factor, Devaney was precisely the type of defendant toward whom RICO is principally directed—18 U.S.C. § 1962(c) targets not just leaders, but also those who operate or manage the criminal enterprise, while 18 U.S.C. § 1962(d) sweeps more broadly to include all persons who conspire to violate any of the other subsections. Second, Devaney faced a statutory maximum of 40 years' imprisonment and $500,000 fine (i.e., 20 years and $250,000 each for Counts 1 and 2), and a Guidelines sentence range of 37 to 46 months' imprisonment and a fine of $7,500 to $1 million. Thus, the forfeiture here was significantly less than the maximum fine allowable under the Guidelines, severely undermining Devaney's argument that the forfeiture order is grossly out of proportion to the gravity of her offense. Third, we consider the harm caused by Devaney's violation of the RICO conspiracy statute. In enacting the statute, Congress "intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots" by providing "enhanced sanctions and new remedies to deal with the

unlawful activities of those engaged in organized crime." *Russello v. United States*, 464 U.S. 16, 26-27, 104 S.Ct. 296, 302, 78 L.Ed.2d 17 (1983) (citing Pub.L. No. 91-452, 84 Stat. 922, 923 (1970)) (quotations omitted). That Congress authorized a maximum fine of $250,000 and 20 years' imprisonment each for Counts 1 and 2 further underscores that it viewed such violations as serious transgressions. We adhere to Congress's view that Devaney's violations of § 1962 constitute a significant harm. Moreover, her fraudulent activities and participation in an unlawful conspiracy harmed two labor unions and their members.

Devaney's reliance on *Bajakajian* is sorely misplaced. In that case, the defendant pled guilty to failing to report $356,144 in cash that he was trying to take overseas. In finding that his forfeiture of the entire amount was grossly disproportionate to the offense, the Court found significant the fact that the defendant's "crime was solely a reporting offense," and "the violation was unrelated to any other illegal activities." *Bajakajian*, 524 U.S. at 337-38, 118 S.Ct. at 2038.[37] In this case, Devaney and Browne were convicted of conspiracy to

37. The Court also noted that Bajakajian did not fit into the class of persons for whom the reporting statute was principally designed—he was neither a money launderer, nor a drug trafficker, nor a tax evader. Under the Sentencing Guidelines, the maximum sentence that Bajakajian could have received was six months' imprisonment and a fine of $5,000, suggesting a low level of culpability. Finally, the harm that Bajakajian caused was minimal, as it affected only the government "in a relatively minor way." *Bajakajian*, 524 U.S. at 338-39, 118 S.Ct. at 2038-39.

abuse their positions in the unions and to misuse union assets for personal gain and substantive RICO violations. Accordingly, the district court's forfeiture order was within constitutional bounds. Devaney has simply failed to demonstrate that the amount of forfeiture is grossly disproportional to the gravity of her offense.

VII.

For the reasons herein stated, the judgment of the district court is

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 19, 2007

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 05-11137-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WALTER J. BROWNE,
a.k.a. Buster,
PATRICIA A. DEVANEY,
a.k.a. Patricia Browne,
a.k.a. Patricia Cardone,
a.k.a. Patricia Browne Cardone,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT and HULL, Circuit Judges, and RESTANI,* Judge.

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*Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

Appendix B

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

c.3

(2)

No. 07-1190

In the Supreme Court of the United States

WALTER BROWNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a conviction under 29 U.S.C. 186(b)(1), which prohibits a union official from accepting payment from an employer whose employees were of the type that the union "would admit to membership," requires proof that the employer currently employed union members.

2. Whether a jury verdict finding a violation of the RICO statute, 18 U.S.C. 1962(c), should be upheld when the jury found at least two predicate racketeering acts that sufficiently establish the continuity requirement of a "pattern" of racketeering activity, but the jury also found other predicate acts that the reviewing court assumes were not sufficiently supported.

3. Whether any error in the jury instructions under 29 U.S.C. 186 in failing to state that the category of "employees" does not include "supervisors" was harmless beyond a reasonable doubt because overwhelming evidence established that the relevant employer had qualifying employees that the union would represent.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 11
Conclusion 27

TABLE OF AUTHORITIES

Cases:

Griffin v. *United States*, 502 U.S. 46 (1991) 9, 18, 19, 20
H.J. Inc. v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) 8, 17
Jackson v. *Virginia*, 443 U.S. 307 (1979) 20
Mitchell v. *Esparza*, 540 U.S. 12 (2003) 10, 23
Neder v. *United States*, 527 U.S. 1 (1999) 10, 23, 24
United States v. *Biaggi*, 909 F.2d 662 (2d Cir. 1990), cert. denied, 499 U.S. 904 (1991) 16, 21, 23
United States v. *Cody*, 722 F.2d 1052 (2d Cir. 1983), cert. denied, 467 U.S. 1226 (1984) 14, 15
United States v. *Cotton*, 535 U.S. 625 (2002) 17, 18
United States v. *Delano*, 55 F.3d 720 (2d Cir. 1995) 16, 21, 22
United States v. *Dhinsa*, 243 F.3d 635 (2d Cir.), cert. denied, 534 U.S. 897 (2001) 23
United States v. *Eisen*, 974 F.2d 246 (2d Cir. 1992), cert. denied, 507 U.S. 998, and 507 U.S. 1029 (1993) .. 22
United States v. *Escobar de Bright*, 742 F.2d 1196 (9th Cir. 1984) 26

Cases—Continued: Page

United States v. *Faust*, 850 F.2d 575 (9th Cir. 1988) 26
United States v. *Hach*, 162 F.3d 937 (7th Cir. 1998), cert. denied, 526 U.S. 1103 (1999) 26
United States v. *Kayser*, 488 F.3d 1070 (9th 2007) 26
United States v. *Napue*, 401 F.2d 107 (7th Cir. 1968), cert. denied, 393 U.S. 1024 (1969) 26
United States v. *Pecora*, 798 F.2d 614 (3d Cir. 1986), cert. denied, 479 U.S. 1064 (1987) 13, 15
United States v. *Powell*, 469 U.S. 57 (1984) 20
United States v. *Resendiz-Ponce*, 127 S. Ct. 782 (2007) .. 26
United States v. *Vastola*, 989 F.2d 1318 (3d Cir. 1993) 20, 21
Wisniewski v. *United States*, 353 U.S. 901 (1957) 26

Statutes and rule:

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*:
18 U.S.C. 1961(1) 4
18 U.S.C. 1961(5) 4
18 U.S.C. 1962(c) 2, 4
18 U.S.C. 1962(d) 2, 4
Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. 141 *et seq.* 4
29 U.S.C. 186 ..... 5, 11, 23, 24
29 U.S.C. 186(a) 11
29 U.S.C. 186(a)(2) 6, 11, 12, 13, 14, 18
29 U.S.C. 186(b) 11
29 U.S.C. 186(b)(1) 2, 4, 11

Statutes and rule—Continued: Page

29 U.S.C. 186(d)(2) 2, 4
18 U.S.C. 2 ..... 2, 4
18 U.S.C. 1341 ..... 2, 4
29 U.S.C. 439(a) 2, 4
Fed. R. Crim. P. 52(b) 17

Miscellaneous:

S. Rep. No. 187, 86th Cong., 1st Sess. (1959) 13

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-98a) is reported at 505 F.3d 1229.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 2007. A petition for rehearing was denied on December 19, 2007 (Pet. App. 99a-100a). The petition for a writ of certiorari was filed on March 17, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiring to participate in the conduct of an enterprise through a pattern of racketeering activ-

ity, in violation of 18 U.S.C. 1962(d); participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); accepting an unlawful payment from an employer while serving as an official of a labor organization, in violation of 29 U.S.C. 186(b)(1) and (d)(2); mail fraud, in violation of 18 U.S.C. 1341 and 2; and failing to maintain labor-organization records, in violation of 29 U.S.C. 439(a) and 18 U.S.C. 2. He was sentenced to 70 months of imprisonment, to be followed by three years of supervised release, and was ordered to forfeit his racketeering proceeds. The court of appeals affirmed. Pet. App. 1a-98a.

1. Petitioner served as a high-level official in two labor unions. Starting in 1977, he was the executive director of District 1-Marine Engineers Beneficial Association (D1-MEBA), an AFL-CIO chartered labor organization. In late 1993, D1-MEBA created an affiliate union, the National Federation of Public and Private Employees (NFOPAPE), and petitioner became its president, while continuing to serve as executive director of D1-MEBA during a transition period. Both unions represented licensed and unlicensed seamen; maritime engineers; land-based support workers handling freight and staffing offices for shipping companies; and various public-sector employees such as bus drivers and custodial workers. Pet. App. 3a-4a, 6a-7a; Gov't C.A. Br. 3-5.

Petitioner's high-level positions within the unions enabled him to make hiring decisions and to incur entertainment and travel expenses for union-related business. Using this authority, petitioner hired his sister, co-defendant Patricia Devaney, as an administrative assistant and gave her full authority over union finances, subject to little or no oversight. Petitioner and Devaney then exercised their collective control over the unions to di-

vert union assets for personal use. For example, petitioner submitted vouchers for reimbursement of personal travel, entertainment, and telephone calls; used union offices during business hours as a forum for high-stakes poker games with personal friends, business leaders, and politicians; and tasked union employees to run his personal errands during business hours. In addition, Devaney routinely submitted vouchers for personal expenses and authorized payment of false bonus checks to herself, her husband, and her daughter. Petitioner concealed these expenditures by refusing other officials' requests to audit union records and by deflecting the officials' complaints about Devaney's handling of the finances. Pet. App. 4a-5a, 7a-11a; Gov't C.A. Br. 6-8, 14-19.

Between 1993 and 1998, while serving at the unions and deriving his income from membership dues, petitioner also accepted payments from employers in the maritime and shipping industries, in return for his "consulting" and "lobbying" efforts on the employers' behalf. For instance, petitioner accepted approximately $250,000 from Hvide Marine, a company that provided tug-boat services, support for offshore drilling, and transportation for petroleum and other chemicals. Hvide was founded by one of petitioner's close friends, and it employed thousands of seamen, other maritime workers, and land-based support employees. The $250,000 that petitioner accepted from Hvide was payment for petitioner's efforts to obtain union support for a proposed labor agreement between Hvide and D1-MEBA. Despite petitioner's efforts, D1-MEBA eventually rejected the proposal because, as one union official put it, it would have been "far and away * * * the

worst contract" that D1-MEBA had. Pet. App. 31a-34a; Gov't C.A. Br. 8-13.

2. A federal grand jury in the Southern District of Florida returned a second superseding indictment charging petitioner with, *inter alia*, conspiring to participate in the conduct of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d) (Count 1); participating in the conduct of an enterprise through a pattern of racketeering activity, in violation of RICO, 18 U.S.C. 1962(c) (Count 2); accepting payment from Hvide, an employer whose employees were ones whom petitioner's unions "represent[ed], s[ought] to represent, or would admit to membership," in violation of the Labor Management Relations Act (Taft-Hartley Act), 29 U.S.C. 186(b)(1) and (d)(2) (Count 3); mail fraud, in violation of 18 U.S.C. 2 and 1341 (Counts 7, 12, 13, and 14); and failing to maintain labor-organization records, in violation of 18 U.S.C. 2 and 29 U.S.C. 439(a) (Count 19). Pet. App. 11a-13a, 52a; Gov't C.A. Br. 1-2; 01-6258-CR Docket Entry No. 210, at 1-47 (S.D. Fla. May 8, 2003) (Dkt.).

Count 2, the substantive RICO count, charged several predicate racketeering acts that formed a pattern under 18 U.S.C. 1961(1) and (5). As relevant here, the predicate acts included accepting the $250,000 payment from Hvide, in violation of the Taft-Hartley Act (Predicate Act 1); accepting similar payments from two other maritime-industry employers, Coastal Gaming Group and Coleary Transport Company, also in violation of the Taft-Hartley Act (Predicate Acts 2 and 4); and submitting expense vouchers for reimbursement of meals and airline tickets unrelated to union business, in violation of

the mail fraud statute (Predicate Acts 13 and 14). Pet. App. 18a-19a, 52a; Dkt. 210, at 12-36 (May 8, 2003).

Petitioner pleaded not guilty and the case proceeded to trial. As part of a proposed jury instruction defining the elements of a Taft-Hartley offense under 29 U.S.C. 186, petitioner suggested that the court instruct the jury: "Supervisory personnel are not employees for purposes of the Taft-Hartley Act." Dkt. 298, at 24 (May 26, 2004). The district court declined to give that part of the instruction. Dkt. 353, at 23 (June 3, 2004).

After a two-month trial, the jury found petitioner guilty on Counts 1, 2, 3, 7, 12, 13, 14, and 19, and acquitted him of the remaining charges. In a special verdict form, the jury indicated that, in finding petitioner guilty on Count 2, it had unanimously found that petitioner committed Predicate Acts 1, 2, 4, 13, and 14. Pet. App. 13a-14a; Dkt. 346, at 1-8 (June 2, 2004).

Petitioner moved for a judgment of acquittal based on evidentiary sufficiency. Dkt. 367, at 1, 3-9 (July 7, 2004). He also sought a new trial, on the ground that the district court erred in denying his motion to sever his trial from Devaney's trial. *Id.* at 9-10. The district court denied those motions. Dkt. 407, at 1-16 (Dec. 15, 2004).

The district court sentenced petitioner to concurrent prison terms of 70 months each on Counts 1, 2, and 7; 60 months each on Count 3, 12, 13, and 14; and 12 months on Count 19. The court also imposed a three-year term of supervised release, and ordered petitioner (jointly and severally with Delaney) to forfeit $592,271.32. Pet. App. 14a; Dkt. 409, at 2 (Dec. 28, 2004); Dkt. 422, at 3-4 (Feb. 24, 2005).

3. The court of appeals affirmed. Pet. App. 1a-98a.

a. The court of appeals first rejected petitioner's challenge to his conviction on Count 3, the Taft-Hartley

Act violation. Pet. App. 20a-37a. Petitioner contended that the evidence was insufficient to show that he accepted a payment from an employer whose employees his unions "would admit to membership," 29 U.S.C. 186(a)(2), because Hvide's existing maritime employees were not currently members of D1-MEBA or NFOPAPE. Pet. App. 20a-22a; Pet. C.A. Br. 37.

The court of appeals observed that Section 186 forbids payment from an employer to a labor official whose union "represents, seeks to represent, or *would admit to membership*, any of the *employees* of such employer who are employed in an industry affecting commerce." Pet. App. 18a (quoting 29 U.S.C. 186(a)(2)). Reading this language "as a whole," the court determined that "there can be no criminal liability under § 186[ ] * * * unless, at the time the payment was made or agreed upon, the employer currently had employees who would be admitted to membership in the union." *Id.* at 23a. As the court explained, "[t]he use of the present tense ('are employed') imposes a temporal limitation on the employment status of those employees whom § 186 would protect from corrupt double-dealing between union officials and employers." *Ibid.* The court also held, however, that although Section 186 "requires an existing employment relationship * * * that association need not be with *current* * * * members" of petitioner's unions; instead, the employees need only be "the type of workers" who "would be admitted to membership" of petitioner's unions. *Id.* at 24a, 33a. Interpreting Section 186 as petitioner suggested, the court observed, would "render * * * superfluous" the "would admit to membership" clause, because another clause of Section 186 independently prohibits payment to an official whose

union *already* "represents" the employer's current employees. *Id.* at 29a.

Applying that test, the court determined that there was sufficient evidence to support petitioner's Taft-Hartley Act conviction. Pet. App. 29a-37a. Based on the evidence, it held that "a reasonable jury could conclude that D1-MEBA and NFOPAPE would have admitted to membership the * * * seamen * * * and land-based support staff" who were already "in Hvide's employ" at the time Hvide payed petitioner $250,000. *Id.* at 32a. As the court explained, "the life blood of [petitioner's] unions was recruitment," and Hvide's employees were "precisely the type of workers that were already organized" in petitioner's unions. *Id.* at 32a-34a.

b. The court of appeals then rejected petitioner's challenges to Counts 1 and 2, the RICO conspiracy count and the substantive RICO count. Pet. App. 37a-57a.

With respect to the substantive RICO count, petitioner argued that a new trial was warranted because two of the predicate acts found by the jury were invalid (Predicate Acts 2 and 4, the alleged Taft-Hartley violations involving Coastal Gaming and Coleary Transport), and it is unclear whether the jury would have found a pattern of racketeering without them. Pet. App. 38a-41a. The court rejected that claim, because, even assuming petitioner's challenges to Predicate Acts 2 and 4 had merit, *id.* at 39a, the remaining predicate acts were sufficient to demonstrate a pattern of racketeering, *id.* at 38a-53a. The court noted that it had already rejected petitioner's challenge to Predicate Act 1 (the Taft-Hartley violation involving Hvide) and that petitioner did not take issue with Predicate Acts 13 and 14 (mail-fraud violations involving reimbursement of meals and travel unrelated to union business). *Id.* at 39a. Ac-

cordingly, the only question remaining was whether the evidence sufficed to show that those predicate acts formed "a pattern of racketeering activity" under RICO. *Id.* at 40a.

Citing this Court's decision in *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), the court of appeals recognized that, to establish a pattern of racketeering activity, the government was required to prove "not only that at least two predicate acts were committed," but also that [1] "the * * * predicates [were] related," and [2] "they amount[ed] to or pose[d] a threat of continued criminal activity." Pet. 40a (quoting *H.J. Inc.*, 492 U.S. at 239). Because petitioner limited his challenge to the "continuity" requirement, the court addressed that issue alone, *id.* at 40a-41a, and had "no trouble" finding that the evidence was sufficient to satisfy it, *id.* at 51a. Reviewing the series of payments that petitioner accepted from Hvide from 1993 through 1998 (Predicate Act 1) and the series of expense vouchers for personal expenditures that he submitted or caused to be submitted on more than a dozen occasions over the course of six years (Predicate Acts 13 and 14), *id.* at 51a-52a, the court found the continuity component of the pattern requirement satisfied. That "series of related [acts] extending over a substantial period of time" suggested that the violations were part of petitioner's "regular way of doing business." *Id.* at 52a-53a (internal quotation marks omitted).

Petitioner argued that, rather than review the sufficiency of the evidence, the court should reverse and remand for a new trial, because Predicate Acts 2 and 4 "were similarly critical to the government's case," and the court should not "hazard a guess" about whether the jury would have found a pattern of racketeering activity

without them. Pet. C.A. Br. 39-44. Because petitioner never sought a new trial on that ground before the district court, the court of appeals "deem[ed] such an argument waived." Pet. App. 16a n.13. The court nonetheless considered and rejected petitioner's argument, explaining that because the jury made no specific finding on the "continuity" issue, its decision on that issue is "much like a general verdict," *id.* at 47a, which is "'valid so long as it was legally supportable on one of the submitted grounds.'". *Id.* at 47a-48a (quoting *Griffin* v. *United States*, 502 U.S. 46, 49, 59-60 (1991)). Because the court determined that a rational jury could find that two or all three of the remaining predicate acts satisfied the "continuity" component of the pattern-of-racketeering-activity requirement, which was the only aspect petitioner challenged, a new trial was not warranted. *Id.* at 45a-51a, 57a.

Turning to the RICO conspiracy count, the court held that the evidence was sufficient to support the jury's verdict, "even assuming that Predicate Acts 2 and 4 fail." Pet. App. 53a-57a. The court concluded that the government presented sufficient evidence to show that petitioner and Devaney agreed to the "overall objective" of "control[ling] the financial affairs of the union[s] and misus[ing] [their] assets and influence for personal gain," *id.* at 55a, noting the evidence that petitioner placed Devaney in charge of the unions' finances, *id.* at 55a; directed her to submit false expense vouchers, *ibid.*; concealed her improper handling of the finances, *id.* at 56a-57a; helped her "deflect[]" other officials' requests to audit union books and records, *id.* at 57a; and failed to

take corrective action when learning of her payroll theft, *ibid.*[1]

c. Finally, the court of appeals rejected petitioner's claim that the district court's failure to give a requested jury instruction further defining "employees" for purposes of the Taft-Hartley Act offenses constituted reversible error. Pet. App. 60a-64a. As a threshold matter, the court disagreed with petitioner's characterization of his proposed instruction as a "theory-of-defense instruction," stating that petitioner "did not propose a proper theory-of-defense instruction, but instead proposed an addition to the court's instruction on the elements that would have excluded supervisors from the definition of 'employees,'" which is "more akin to a failure by the district court to instruct on one element of an offense than a failure to explain a specific defense theory." *Id.* at 61a n.29.

In any event, the court determined, even if petitioner were correct that the district court should have instructed the jury that supervisors are excluded from "employees," any error was harmless. Pet. App. 62a-63a. The court observed that "[a] district court's failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-error analysis." *Id.* at 63a (citing *Mitchell* v. *Esparza*, 540 U.S. 12, 16 (2003) (per curiam), and *Neder* v. *United States*, 527 U.S. 1, 9 (1999)). It then concluded that any omission here was harmless beyond a reasonable doubt as to Count 3 because the government presented "overwhelming evi-

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[1] The court also rejected petitioner's challenge on the mail fraud count, Count 7, explaining that although mail fraud "is distinct from a violation of the Taft-Hartley Act," petitioner raised "no specific challenges to his conviction," and "there was sufficient evidence at trial to establish the elements of the crime." Pet. App. 57a-60a.

dence" that not all the relevant seamen were "supervisors" for collective-bargaining purposes; petitioner's unions represented non-supervisory seamen; and Hvide employed seamen "that were of the precise type of workers that were already organized by" petitioner's unions. *Id.* at 63a-64a. In the court's view, even with petitioner's proposed "supervisor" instruction, "the jury would have reached the same conclusion." *Id.* at 64a.[2]

ARGUMENT

1. Petitioner first contends (Pet. 16-20) that the court of appeals erred in upholding his conviction on Count 3 because 29 U.S.C. 186 requires proof of an "*existing* employment relationship" not only between Hvide and its workers but *also* between those workers and petitioner's unions. That contention lacks merit and does not warrant further review.

a. Section 186(b), the provision under which petitioner was charged in Count 3, makes it "unlawful for any person to * * * accept * * * any payment * * * prohibited by" Section 186(a). 29 U.S.C. 186(b)(1). As relevant here, Section 186(a) makes it "unlawful for any employer * * * to pay * * * any money * * * to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce." 29 U.S.C. 186(a)(2).

As the court of appeals correctly held (Pet. App. 22a-23a), this statutory language requires proof of an exist-

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[2] Petitioner also argued that the district court erred in refusing to sever his case from Devaney's. The court of appeals rejected that contention, Pet. App. 64a-71a, and petitioner does not renew it before this Court.

ing relationship between the employer (here, Hvide) and its own employees (here, Hvide's seamen and other workers) at the time of the allegedly unlawful payment to a union official.[3] But contrary to petitioner's argument, that does not mean that those employees also must have been *members of the official's union* when their employer paid the union official. Pet. App. 22a-29a. The statute's plain language requires only that the employee have employees that the union "would admit to membership." 29 U.S.C. 186(a)(2); see Pet. App. 24a. Petitioner's reading of the statute would render meaningless the "would admit to membership" clause, because, as the court of appeals recognized (Pet. App. 29a), a separate clause of Section 186 independently prohibits

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[3] Petitioner actually suggested otherwise in the district court. One of his proposed jury instructions read: "'[W]ould admit to membership' * * * means that at the time [the alleged payment was made], there was either a present intention for the employees of the employer to apply for membership [in petitioner's union] or that there was a present *intention* for the employer * * * *to employ employees* that would or could be admitted into membership." Dkt. 298, at 25 (Mar. 26, 2004) (emphases added). The district court approved this instruction and read it, all but verbatim, to the jury. Dkt. 353, at 25 (June 3, 2004). When rejecting petitioner's sufficiency challenge to Count 3, the court of appeals noted (Pet. App. 21a-22a n.14) that petitioner was not challenging the district court's instruction, likely because he himself had proposed it.

Neither the court of appeals nor the government suggested that, by proposing an instruction that did not require the government to prove an existing employment relationship between either (1) Hvide and its own workers, or (2) Hvide's workers and petitioner's unions, petitioner had waived the right to advocate such a requirement on appeal. Because further review is unwarranted in any event, this Court need not decide whether petitioner should be estopped from raising a claim now that directly contradicts the position he took in the district court.

paying an official whose union already "represents" the employer's current employees. 29 U.S.C. 186(a)(2).

The statute's legislative history confirms this construction. As the Third Circuit observed in *United States* v. *Pecora*, 798 F.2d 614 (1986), cert. denied, 479 U.S. 1064 (1987), the Taft-Hartley Act added the phrase "would admit to membership" because the previous version of Section 186 "proscribed only payments to [employees' current union] representatives." *Id.* at 622. The legislation was a direct response to perceived "loopholes * * * which both employer representatives and union officials turned to advantage at the expense of employees." *Ibid.* (quoting S. Rep. No. 187, 86th Cong., 1st Sess. 13 (1959)). One of the specific "loopholes" the legislation sought to correct was the situation in which a union was not already "a 'representative' of any of the employer's employees" and the employer paid off a union official in an effort to "induce . . . [the union] not to organize or represent the employees" in the first place. *Ibid.* (internal quotation marks omitted).

The Third Circuit in *Pecora*, like the court of appeals here, was presented with just the situation Congress contemplated—the employer's existing employees were not already represented by the union of which the defendant was an official when the defendant received payments from the employer. 798 F.2d at 619. And, like the court of appeals here, the *Pecora* court affirmed the defendant's conviction based on the "would admit to membership" clause, which would be "superfluous" if the statute were construed to require an existing relationship between the employer's employees and the defendant's union. *Id.* at 622. The court of appeals thus correctly rejected petitioner's contention that Hvide em-

ployees were required to have an existing relationship with his unions under 29 U.S.C. 186(a)(2).

b. Petitioner is mistaken in contending (Pet. 16-19) that the decision below conflicts with *United States* v. *Cody*, 722 F.2d 1052 (2d Cir. 1983), cert. denied, 467 U.S. 1226 (1984). The defendant in *Cody*, an official of a union whose members included truck drivers and similar workers, accepted the rent-free use of an apartment from a construction company. *Id.* at 1056-1057. Because the construction company did not employ any members of the defendant's union, he argued that the evidence was insufficient to support a conviction under 29 U.S.C. 186(a)(2). *Id.* at 1056-1057.

In addressing that sufficiency challenge, the *Cody* court emphasized that Section 186 prohibits a union official from accepting payment from an employer where the union would admit to membership "any of the *employees of such employer*." 722 F.2d at 1058 (quoting 29 U.S.C. 186(a)(2)). Based on this language, as well as the legislative history discussed above, the court reasoned that the statute was intended "to deal with employers' attempts through bribery of union officials to block unionization of [employers'] *present* employees." *Ibid.* "In other words," the court observed, "the statute was designed to protect possible *future unionization* of present employees, not, as here, the possible *future hiring* of present union members." *Id.* at 1059 (emphases added). The court thus rejected the government's argument that liability should attach because the construction company "would have employed * * * members [of the defendant's union] in the future," and it concluded that the government's evidence was insufficient because it showed only that the payment related to "future hiring," not "future unionization." *Id.* at 1058-1059.

The decision below is consistent with *Cody*. Like the Second Circuit in *Cody*, the court of appeals here recognized that "there can be no criminal liability under § 186[] * * * unless, at the time the payment was made or agreed upon, the employer *currently had employees* who would be admitted to membership in the union." Pet. App. 23a (emphasis added). Unlike in *Cody*, however, the government's evidence here met that requirement. The evidence showed that, at the time Hvide paid petitioner, the company already had "in [its] employ" "seamen * * * and land-based support staff" who "were the very types of employees that [petitioner's unions] would have admitted to membership." *Id.* at 32a, 34a. In other words, the payment here did not implicate "possible future hiring of present union members." *Cody*, 722 F.2d at 1059. Rather, the payment threatened "the possible future unionization of [Hvide's] present employees." *Ibid.* As *Cody* recognized, that was precisely the threat that the Taft-Hartley Act was meant to combat. *Ibid.*; see *Pecora*, 798 F.2d at 622. In sum, given *Cody's* reasoning, there is no reason to believe that the Second Circuit would have reached a different conclusion than the court below did on the facts of this case.

To the extent that there is any tension between the Second Circuit's analytical approach on the one hand and the Third and Eleventh Circuits' approach on the other, review is not warranted at this time. Petitioner cites no case in which the Second Circuit or any other court has reversed a conviction where "possible future unionization" of present employees—as opposed to "possible future hiring of present union members"—was at issue. *Cody*, 722 F.2d at 1059. Indeed, petitioner himself points out (Pet. 18) that, "[b]efore the Eleventh

Circuit's decision in this case," there were "only two other decisions" that had squarely addressed the "would admit to membership" clause. The infrequency with which the issue has arisen confirms that any slight differences in the circuits' approaches do not warrant this Court's immediate review.

2. Petitioner also contends (Pet. 20-24) that Predicate Acts 2 and 4 "should never have been submitted to the jury," and as a result, the court of appeals should have reversed and remanded for a new trial on the substantive RICO count (Count 2), rather than conclude that there was sufficient evidence to uphold petitioner's RICO conviction using Predicate Acts 1, 13, and 14. He asserts (Pet. 21-23) that the decision below conflicts with the Second Circuit's decisions in *United States* v. *Delano*, 55 F.3d 720 (1995), and *United States* v. *Biaggi*, 909 F.2d 662 (1990), cert. denied, 499 U.S. 904 (1991).[4]

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[4] Petitioner challenged both the substantive RICO count (Count 2) and the RICO conspiracy count (Count 1) on this basis before the court of appeals. The court of appeals upheld Count 1 not based on any "agreement to commit personally two predicate acts," but instead because petitioner "agreed to the overall objective of the enterprise * * * to control the financial affairs of the union[s] and misuse [their] assets and influence for personal gain." Pet. App. 55a. Petitioner does not take issue with that holding, and he does not appear to raise any challenge to Count 1 in his petition. In any event, any such challenge would lack merit, because the court of appeals did not rely on the predicate acts found by the jury to uphold Count 1.

Petitioner also challenged Count 7 on this basis before the court of appeals, and he appears to renew that contention before this Court. Pet. 24 n.12. The court of appeals rejected petitioner's challenge to Count 7, explaining that mail fraud does not require proof of the Taft-Hartley violations alleged in Predicate Acts 2 and 4. Pet. App. 57a-64a. Petitioner does not take issue with that analysis in his petition, instead simply asserting that the "same analysis" applies to Count 2 and Count 7. Pet. 24 n.12. Petitioner makes no argument in support of that

The court of appeals' decision is correct, and there is no circuit conflict that warrants this Court's review.

a. In *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989), this Court held that, to form a pattern of racketeering activity under RICO, the predicate acts at issue must be "related" and must "amount to or pose a threat of continued criminal activity." *Id.* at 239. Petitioner contends (Pet. 20-24) that Predicate Acts 2 and 4 are invalid and the court of appeals was consequently required to remand for a new trial rather than consider whether the evidence was sufficient to establish a pattern of racketeering on the basis of the remaining predicate acts (Predicate Acts 1, 13, and 14).

Petitioner's claim should be reviewed for plain error. As the court of appeals observed (Pet. App. 16a n.13), petitioner never "moved [in] the district court for a new trial" as to Count 2 "on the ground of the insufficiency of the predicate acts." It therefore "deem[ed] such an argument waived." *Ibid.* (The court nonetheless considered the claim and found that the district court did not err. *Id.* at 37a-51a.) Petitioner does not dispute that he failed to timely raise the claim. Thus, petitioner would not be entitled to relief under Federal Rule of Criminal Procedure 52(b) unless he could establish reversible plain error, which is to say, error that is plain or obvious, affects substantial rights, and seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002).

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assertion, and it does not warrant review. In any event, as the court of appeals explained, petitioner is mistaken in suggesting that the validity of Predicate Acts 2 and 4 affects his conviction on Count 7. See Pet. App. 57a-60a.

Petitioner cannot establish reversible plain error. First, there is no error, because there was no basis for the court of appeals to assume that Predicate Acts 2 and 4 were invalid and consider whether a new trial was warranted in the first place. Petitioner did not argue that there was insufficient evidence to support Predicate Acts 2 and 4; his challenge to Predicate Acts 2 and 4 was that the district court erred in interpreting the "would admit to membership" clause in 29 U.S.C. 186(a)(2). Pet. C.A. Br. 36, 38-39. The court of appeals expressly rejected that argument. Pet. App. 22a-23a. The court of appeals apparently believed that petitioner raised a separate sufficiency-of-the-evidence challenge to Predicate Acts 2 and 4, *id.* at 37a, but he did not.[5] Because there was no basis for assuming the invalidity of Predicate Acts 2 and 4, petitioner cannot establish error, even on his own theory about what a court should do when confronted with some invalid and some valid predicate acts. He surely cannot establish obvious error that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Cotton*, 535 U.S. at 631-632 (internal quotation marks omitted).

Second, the court of appeals correctly upheld petitioner's conviction, rather than remand for a new trial, on the basis of this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991). In *Griffin*, this Court held that when the jury was instructed that it could find the defendant guilty of conspiracy if she had participated in either of the two objects of the conspiracy, and the jury returned a general verdict of guilty, the verdict must stand so long as one of the objects of the conspiracy was

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[5] Even if petitioner had made such an argument, a rational jury could have concluded, based on the evidence at trial, that petitioner committed Predicate Acts 2 and 4. See Gov't C.A. Br. 48-49.

supported by sufficient evidence. *Id.* at 47-48. The Court found no precedent to support the claim that a general verdict must be set aside where "one of the possible bases of conviction was neither unconstitutional * * * nor even illegal * * * but merely unsupported by sufficient evidence." *Id.* at 56. And the Court explained that it was reasonable to distinguish between a jury instruction that misstates the law and one that presents a theory of conviction that is not supported by the evidence, because although "[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law," they are "well equipped to analyze the evidence." *Id.* at 59-60.

The court of appeals correctly applied the logic of *Griffin* to this case. The court of appeals noted that, although the jury returned a special verdict finding multiple predicate acts, the jury did not specify which predicate acts it considered in concluding that petitioner engaged in a pattern of racketeering. Pet. App. 47a ("The jury's decisions on individual predicate acts indicate nothing about its finding of continuity. In this regard, the jury's finding of continuity is, with regard to that limited issue, much like a general verdict."). If Predicate Acts 2 and 4 were not supported by sufficient evidence, it would not mean that the remaining predicate acts were insufficient to establish the "continuity" component of the pattern element. The question under *Griffin* is whether a rational jury could have found that the remaining predicate acts did form a pattern of racketeering activity. *Id.* at 47a-49a. The court below properly undertook that inquiry and correctly concluded that the evidence on Predicate Acts 1, 13, and 14 supported the jury's finding of a pattern of racketeering. *Id.* at

51a-53a (Predicate Acts 1, 13, and 14 "constitute[d] a series of related predicates extending over a substantial period of time" and "were part of the defendants' regular way of doing business" (internal quotation marks omitted)).

It is true that this case differs from *Griffin* in that the jury actually found that petitioner committed Predicate Acts 2 and 4, which the court of appeals assumed was an erroneous finding. But it is nonetheless appropriate to apply *Griffin* to this case, because the jury did not return a special verdict indicating which predicate acts it determined formed a pattern of racketeering, and due process concerns are met if *any* rational jury could have found guilt beyond a reasonable doubt based on the evidence adduced. See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). As the court of appeals recognized, a contrary approach "would require unwarranted speculation into the jury's decisionmaking." Pet. App. 50a. Although *Griffin* presumes that jurors are well-equipped to identify a "factually inadequate theory," 502 U.S. at 59, and the court of appeals here assumed that the jury erroneously found sufficient evidence to support Predicate Acts 2 and 4, any error by the jury on those predicate acts does not render the guilty verdict infirm so long as there is sufficient evidence to support the jury's finding using only the valid predicate acts. See *United States* v. *Powell*, 469 U.S. 57, 66-69 (1984) (rejecting argument that guilty verdict must be vacated when verdicts were inconsistent but evidence was independently sufficient to uphold guilty verdict).

The Third Circuit took essentially the same approach in *United States* v. *Vastola*, 989 F.2d 1318 (1993), where it relied on *Griffin* and *Powell* to uphold a conviction on a substantive RICO count where the jury acquitted or

deadlocked on several substantive counts that were also charged as predicate acts, but found the defendant guilty on the substantive RICO count, and there was no special verdict stating the predicate acts upon which the jury relied. *Id.* at 1328-1331. The court explained that "[w]here there has been an inconsistent verdict, the criminal defendant is protected against jury irrationality and error by a review of the sufficiency of the evidence," and there was sufficient evidence to support the jury's verdict in that case. *Id.* at 1331. The same is true here. There is thus no plain or obvious error on this issue.

b. Petitioner is mistaken in contending (Pet. 20-23) that there is disagreement in the circuits that warrants this Court's review. The Second Circuit has, in at least two cases, employed an approach slightly different from the one employed by the court below. That approach, however, originated before this Court's decision in *Griffin*, on which the court below relied. Pet. App. 47a-48a. Because the court below distinguished the Second Circuit's approach on the basis of *Griffin*, because the Second Circuit has not evaluated the impact of *Griffin*, and because petitioner would not prevail even under the Second Circuit's approach, there is no conflict that warrants review at this time.

In *United States* v. *Delano*, 55 F.3d 720 (1995), the Second Circuit held that where the invalidated predicate acts "represent[] the bulk of th[e] RICO prosecution" —thereby "eclipsing" the remaining predicate acts—it would be inappropriate to "hazard a guess" about whether the jury would have found the defendant guilty of the RICO charge even absent those "eclipsing" predicate acts. *Id.* at 729. But *Delano* drew that approach from *United States* v. *Biaggi*, 909 F.2d 662 (2d Cir. 1990), which predated this Court's decision in *Griffin*. See

Delano, 55 F.3d at 728 (opting to "[f]ollow[] th[e] rationale" of *Biaggi*). In *Delano*, neither party cited *Griffin* in its briefing or suggested that the case might call *Biaggi* into question. Furthermore, in a RICO case preceding *Delano*, the Second Circuit indicated that, under *Griffin*, "even a *general* verdict * * * is to be upheld on appeal against a claim of insufficient evidence to support one of [multiple] alternative bases for conviction whenever the evidence suffices for at least one basis." *United States* v. *Eisen*, 974 F.2d 246, 258 (1992), cert. denied, 507 U.S. 998, and 507 U.S. 1029 (1993). Because the Second Circuit's approach predated this Court's decision in *Griffin*, and because it is unclear whether it survives *Griffin*, there is no clear circuit conflict. Review of the question presented thus would be premature at this time.

This case would not be an appropriate vehicle through which to resolve any tension in the circuits in any event because petitioner would not be entitled to a new trial on Count 2 under *Delano*. As the court of appeals recognized (Pet. App. 51a), "*Delano*'s holding applies, at most, to cases in which the invalidated predicate acts dominate the RICO prosecution." Even if it were fair to characterize Predicate Acts 2 and 4 as "invalidated" rather than simply unaddressed, it would be inaccurate to say that they "dominate[d]" the prosecution, "eclipsing" Predicate Acts 1, 13, and 14. *Delano*, 55 F.3d 729. The conduct alleged in Predicate Acts 2 and 4—namely, petitioner's acceptance of unlawful payments from Coastal Gaming and Coleary Transport—spanned a period of less than two years. Dkt. 210, at 14-15 (May 8, 2003). The indictment's other counts did not charge those payments as stand-alone offenses. By contrast, the conduct alleged in Predicate 1—petitioner's accep-

tance of unlawful payments from Hvide—spanned a period of nearly five years and was charged as a standalone Taft-Hartley violation in Count 3. *Id.* at 13-14, 37. Similarly, the conduct alleged in Predicate Acts 13 and 14 "spanned six years" (Pet. App. 52a) and encompassed more than a dozen improper expense vouchers. It is not at all clear that, if presented with these same circumstances, the Second Circuit would reverse and remand for a new trial. See, *e.g.*, *United States* v. *Dhinsa*, 243 F.3d 635, 670 (2d Cir.) (affirming RICO conviction after invalidation of predicate act that, in appellate court's view, could not have been "essential" to conviction (internal quotation marks omitted)), cert. denied, 534 U.S. 897 (2001); *Biaggi*, 909 F.2d at 693 ("In some circumstances, the jury's findings of two predicate acts * * * will permit affirmance of a RICO conviction notwithstanding the invalidation of other predicate acts."). Further review of this claim is therefore unwarranted.

3. Finally, petitioner contends (Pet. 25-27) that the court of appeals should not have reviewed for harmless error the district court's refusal to instruct the jury that "[s]upervisory personnel are not employees" (Dkt. 298, at 24 (Mar. 26, 2004)) under 29 U.S.C. 186, which he characterizes as a "theory-of-defense" instruction. Further review on that issue is not warranted.

a. In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court held that "an instruction that omits an element of the offense" altogether "does not *necessarily* render a criminal trial fundamentally unfair," and that such an instructional error is therefore amenable to harmless-error analysis. *Id.* at 9; see *Mitchell* v. *Esparza*, 540 U.S. 12, 16 (2003) (per curiam). The court of appeals correctly applied *Neder* to petitioner's request for a jury instruction further defining the term "employees" in 29

U.S.C. 186 and found the alleged error to be harmless beyond a reasonable doubt.

Petitioner contended that the district court should have added a sentence to the instruction defining the elements of a 29 U.S.C. 186 offense to say: "Supervisory personnel are not employees for purposes of the Taft-Hartley Act." Dkt. 298, at 24 (Mar. 26, 2004). The court of appeals characterized the requested instruction as one that defines "an element of the offense," *Neder*, 527 U.S. at 9, explaining that petitioner "did not propose a proper theory-of-defense instruction" about supervisory personnel "but instead proposed an addition to the [district] court's instruction on the elements that would have excluded supervisors from the definition of 'employees.'" Pet. App. 61a n.29. Thus, in the court of appeals' view, the district court's refusal to instruct that "[s]upervisory personnel are not employees" was "more akin to a failure by the district court to instruct on one element of an offense than a failure to explain a specific defense theory." *Ibid.*

Having framed the issue in this way, the court assumed *arguendo* that the district court had erred, Pet. App. 62a, then reviewed the alleged error for harmlessness under *Neder* and found beyond a reasonable doubt that petitioner could not have suffered prejudice, *id.* at 63a-64a. The court correctly found that any error would be harmless beyond a reasonable doubt, because even if supervisors were not "employees" under 29 U.S.C. 186, "the evidence adduced at trial covered a significantly broader range of employees than merely supervisors" and "established that D1-MEBA and NFOPAPE actively organized to increase their job base and ensure their survival," leaving "no reasonable doubt that the

jury would have reached the same conclusion." *Id.* at 63a-64a.[6]

b. Petitioner does not dispute the court of appeals' conclusion that he did not actually submit a theory-of-defense instruction. Nor does he dispute the corollary conclusion that any error was the equivalent of failing to instruct on an element of the Taft-Hartley offense. And he does not take issue with the court of appeals' conclusion that, assuming *Neder* applies, any error was harmless beyond a reasonable doubt. Instead, he contends (Pet. 26-27) that review is warranted because "the governing law is that a district court's refusal to instruct the jury on defendant's theory of defense is reversible error if the instruction is correct and supported by the evidence."

Petitioner is wrong to suggest (Pet. 27) that the decision below conflicts with decisions from several other circuits (and from the Eleventh Circuit itself), because the court below did not hold that a refusal to give a correct and adequately supported *theory-of-defense* instruction was not reversible error. Rather, it held that a refusal to instruct on an *element of an offense* does not automatically constitute reversible error, and that legal rule is entirely in line with *Neder*. Pet. App. 62a-63a. Moreover, none of the cases petitioner cites (Pet. 26-27) squarely addressed the applicability *vel non* of the

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[6] In disputing the court of appeals' finding of no prejudice, petitioner asserts that "the government *never* argued to the Eleventh Circuit that the [presumed] error was harmless." Pet. 26 n.14. He is mistaken. See, *e.g.*, Gov't C.A. Br. 20 ("If the court's instruction was erroneous, it was harmless."); *id.* at 41 (arguing that, even if the court's instruction were erroneous, petitioner "nonetheless is not entitled to reversal * * * because D1-MEBA and/or NFOPAPE represented both supervisory and non-supervisory personnel").

harmless-error doctrine, whether to omission of an element or to a refusal to instruct on a defense theory, and none of the cases held, contrary to the decision below and to *Neder*, that an error "akin to" omission of an element is reversible error per se.[7] Further, to the extent petitioner seeks review to harmonize two decisions of the Eleventh Circuit, that is a task for the court of appeals, not for this Court. *E.g., Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

In any event, this case would be an inappropriate vehicle through which to resolve any disagreement, not only because the court of appeals concluded that petitioner did not even propose a theory-of-defense instruction, but also because the court merely *presumed* an error where no such error may have occurred. Cf. *United States* v. *Resendiz-Ponce*, 127 S. Ct. 782, 785 (2007) (noting that the Court had "granted the * * * petition for certiorari to answer the question whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error," but resolving the case without reaching that question because the indictment at issue was not defective).

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[7] Indeed, the Seventh and Ninth Circuit decisions that petitioner cites predated *Neder*. See *United States* v. *Hach*, 162 F.3d 937, 946 (7th Cir. 1998), cert. denied, 526 U.S. 1103 (1999); *United States* v. *Faust*, 850 F.2d 575, 583 (9th Cir. 1988). The Seventh Circuit has long reviewed for harmless error the refusal to instruct on a defense theory. See, *e.g.*, *United States* v. *Napue*, 401 F.2d 107, 112 (1968), cert. denied, 393 U.S. 1024 (1969). Although the Ninth Circuit has held that an erroneous refusal to instruct on a defense theory is reversible error, see, *e.g.*, *United States* v. *Escobar de Bright*, 742 F.2d 1196, 1201-1202 (1984), it has not yet had occasion to "revisit[]" that holding "in light of *Neder*," *United States* v. *Kayser*, 488 F.3d 1070, 1077 n.7 (2007).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

WALTER BROWNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

REPLY BRIEF FOR PETITIONER 1

TABLE OF CITATIONS

Page

Cases

Griffin v. United States
502 U.S. 46 (1991) 3, 4

Neder v. United States
527 U.S. 1 (1999) 6, 7, 8

United States v. Biaggi
909 F.2d 662 (2d Cir. 1990),
cert. denied, 499 U.S. 904 (1991) 3, 4, 5, 6

United States v. Cody
722 F.2d 1052 (2d Cir. 1983),
cert. denied, 467 U.S. 1226 (1984) 1, 2, 3, 5

United States v. Delano
55 F.3d 720 (2d Cir. 1995) 3, 4, 5, 6

United States v. Kayser
488 F.3d 1070 (9th Cir. 2007) 7

United States v. Quattrone
441 F.3d 153 (2d Cir. 2006) 8

Whitman v. American Trucking Ass'ns
531 U.S. 457 (2001) 1

Federal Statutes

29 U.S.C. § 186(a)(2) 1, 2

REPLY BRIEF FOR PETITIONER

The government's response attempts to deny a conflict among the Circuits that is expressly recognized in the Eleventh Circuit's opinion, to obfuscate a second acknowledged conflict by concocting a waiver argument, and to mask the third conflict by conflating two doctrines into a non-existent rule. In the end, the government cannot obscure that which the Eleventh Circuit itself recognized – that the decision expressly, and admittedly, creates disharmony among the Circuits. And, contrary to the government's repeated fallback argument that, with respect to *all* of the conflicts, review is not warranted "at this time" or in this case (Brief for the United States in Opposition (BIO) at 15, 21, 26), Browne submits that the issues are plainly fit for this Court's review and that the undeniable hardship of being denied the new trial to which he assuredly would be entitled if the Court adopts the conflicting principles as correct fully warrants review. *See, e.g., Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 479 (2001).

1. The government all but concedes that – as the Eleventh Circuit readily acknowledged – the court's interpretation of 29 U.S.C. § 186(a)(2) directly conflicts with the Second Circuit's interpretation of the same statute in *United States v. Cody*, 722 F.2d 1052 (2d Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). BIO 15. The government's attempt to paper over a conflict that the Eleventh Circuit readily embraced in rejecting *Cody* (App. 24-26), because "there is no reason to believe that the Second Circuit would have reached a different conclusion than the court below did on the facts of this case" (BIO 15) is, at best, unpersuasive.

The government accurately depicts the *Cody* holding. BIO 14. But it then ignores the Eleventh Circuit's unqualified rejection of *Cody*'s interpretation of Section 186(a)(2): "We see nothing in the statute or its legislative

history to support *Cody*'s seeming assertion that the existing employment relationship must be between the employer and current union members." (App. 26). And that acknowledged conflict cannot be evaded on the notion that Browne's conviction would have been upheld by the Second Circuit.

As the government concedes (BIO 14), *Cody* held that Section 186(a)(2) "was designed to protect the possible future unionization of present employees, not, as here, the possible future hiring of present union members." 722 F.2d at 1058-59. Section 186 requires an "*existing* employment relationship, between the employer and members of the union, not the possibility of a future relationship." *Id.* at 1058 (original emphasis). Here, there was undisputedly no such relationship: even under the government's portrayal of the evidence, the discussions between MEBA and Hvide involved a potential "future relationship" between the employer and the union.[1]

Finally, the government's blithe assertion that "the payment [to Browne] threatened 'the possible future unionization of [Hvide's] present employees'" (BIO 15), such that *Cody* can be read in harmony with the Eleventh Circuit's decision, is both unsupported by the record and incompatible with *Cody*'s actual holding. First, the undisputed evidence is that Hvide, consistent with its business practices, openly hired Browne as a lobbyist and consultant (and reported his compensation to the IRS), and that Browne openly registered with Broward County as a Hvide lobbyist. (R:442:21-22; R:430:112-27; R:438:175-76;

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[1] Moreover, the undisputed evidence establishes that Hvide *would not have employed* the MEBA members who might serve as engineers or officers on the as-yet unbuilt tankers, *i.e.*, a new operating company (of which Hvide would only be a 50% owner) would be created to operate the ships (R:431:81-82), such that Hvide would not itself have a relationship with MEBA.

R:444:62; Ex.83-84; Ex.308; Ex.417).[2] There was no evidence that Hvide's payments to Browne were intended to prevent future unionization of its employees, any more than there was such evidence in *Cody*. As the Second Circuit held, in language that assuredly would have been used to reverse Browne's conviction, the connection between the employer and the union official "was too nebulous at the time the gift was made to be the basis for a criminal charge," even if "it could be surmised that [the employer] hoped to obtain future good will" from the union official. *Id.* at 1059.

Because, as construed by the Second Circuit, Section 186 only criminalizes payments to a union official when future hiring is more than hypothetical, *i.e.*, when there is a potential collective bargaining relationship in the offing, *id.*, at 1059 ("it is this type of corruption that the framers of Section 186 sought to deter" rather than "where the plans were unformed and the friendly relationship was not then fairly susceptible to a more disparaging interpretation"), the government cannot escape the acknowledged conflict between the Eleventh Circuit's decision and *Cody*.

2. The same is true with respect to the Eleventh Circuit's rejection of the Second Circuit's decisions in *United States v. Biaggi*, 909 F.2d 662, 692-93 (2d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991), and *United States v. Delano*, 55 F.3d 720 (2d Cir. 1995). (App. 41, 50-53). Seeking to avoid the acknowledged conflict of decisions, the government somewhat tepidly asserts that *Biaggi* is inconsistent with this Court's subsequent decision in *Griffin v. United States*, 502 U.S. 46 (1991), and that, although *Delano* post-dates *Griffin* by some four years, the Second Circuit "drew [its] approach" in *Delano* from *Biaggi*, without reference to *Griffin*, purportedly because "neither party cited

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[2] Browne and other lobbyists assisted Hvide in seeking an extension of a tugboat contract with the local port authority. (R:440:29-34).

Griffin in its briefing or suggested that the case might call *Biaggi* into question." BIO 21-22.[3] A more likely explanation is that *Griffin* and the Second Circuit's decisions address wholly different legal questions.

As Browne has noted, *Griffin*'s rationale has been invoked in RICO cases when the question is whether a RICO conviction can be upheld *against a sufficiency-of-the-evidence* challenge when all but two predicate acts have been rejected. Petition for Writ of Certiorari (Petition) at 20 n.13. If anything, the Eleventh Circuit's invocation of *Griffin* as a basis for rejecting the Second Circuit's measured approach – under which each trial should be reviewed to determine whether an appellate court's striking of critical RICO predicate acts warrants *a new trial* because the jury might well have been prejudiced by considering the invalidated predicate acts – yet further shows the propriety of granting review here. And that critical distinction also undoes the government's "waiver" argument. BIO 17-18.

As in *Delano*, Browne argued to the Eleventh Circuit that the invalidation of all but two predicate acts – here, because the Eleventh Circuit assumed that to be so (App. 30, 37, 53) – required a new trial on the RICO charges because the Taft-Hartley predicate acts were the centerpiece of the government's case. Brief of Appellant Browne at 39-44, *United States v. Browne*, No. 05-11137-G (11th Cir. June 22, 2005); Browne's Reply Brief at 20-22, *United States v. Browne*, No. 05-11137-G (11th Cir. Nov. 14, 2005). The government has yet directly to address that contention, and its attempt to transform Browne's reliance on the Second Circuit's cases into a waived "sufficiency" challenge cannot

[3] Here too, the government never invoked *Griffin* in the Eleventh Circuit to suggest that *Biaggi* or *Delano* had been wrongly decided. Brief for the United States at 52-53, *United States v. Browne*, No. 05-11137-G (11th Cir. Oct. 7, 2005). *Griffin* first appears in the Eleventh Circuit's decision on appeal.

disguise the Eleventh Circuit's expressly stated refusal to follow *Biaggi* and *Delano*.

Without the presumptively invalid Taft-Hartley predicate acts – including the Section 186 charge, which should have been invalidated under *Cody* – the government was left with two predicate acts arising from allegedly improper use of union vouchers upon which to sustain the RICO (and theft of honest services) convictions. The government's closing argument to the jury belies any contention that the Taft-Hartley predicate acts were anything other than the critical focus of the RICO charges:

> Walter Browne accomplished his goals by using the influence and assets and the prestige of the union, prestige that he had as the president of the union, to unlawfully accept payments from employers ....
>
> ... There is an inherent conflict between labor and management.... But from the conflict comes a negotiated compromise, and that negotiated compromise only works when the playing field is level.
>
> And the playing field cannot be level when the union officials are lining their pockets with money.
>
> And when an union official takes money from an employer or asks for money from an employer, not only is it a direct conflict of interest but it is a violation of their fiduciary duties.
>
> * * * *
>
> ... If you are an employer and you pay Walter Browne, you're not going to get organized....

> If you are a friend of Walter Browne, if you line his pocket, he will do what management wants.
>
> He is not going to act in the interest of labor....

(R:452:13-14, 49).[4] The government cannot evade the acknowledged conflict with *Biaggi* and *Delano*. As in those cases, the elimination of critical predicate acts should result in a new trial.

3. The government misapprehends the third conflict in the Eleventh Circuit's decision. Browne does *not* argue that the Eleventh Circuit "should not have reviewed for harmless error the district court's refusal to instruct the jury that '[s]upervisory personnel are not employees.'" BIO 23. Rather, the petition simply asserts that the Eleventh Circuit's use of the *Neder v. United States*, 527 U.S. 1 (1999) harmless-error standard (App. 63) both misapplies *Neder* and conflicts with precedent that, as the government acknowledges, holds it reversible error to deny a theory-of-defense instruction that is supported by the evidence. Petition at 26-27; BIO 25.

The government's core response serves, if anything, to sharpen the need for review of the Eleventh Circuit's decision. The government argues that the Eleventh Circuit "did not hold that a refusal to give a correct and adequately supported *theory-of-defense* instruction was not reversible error," but that "a refusal to instruct on an *element of an offense* does not automatically constitute reversible error." BIO 25 (original emphasis). Browne *never* argued to the Eleventh Circuit that the district court's refusal to charge the

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[4] The government's contrary analysis inappropriately takes into account two predicate acts that the Eleventh Circuit declined to address – because it disagrees with the Second Circuit's decisions. (App. 39-42).

jury on his theory of defense to the Taft-Hartley charges "automatically consitute[d] reversible error," but rather that, because the instruction was legally correct – a proposition that the government has not questioned on appeal or before this Court – and supported by the evidence, which is also unquestioned, the district court's ruling constituted reversible error. Brief of Appellant, *supra* 4, at 36; Reply Brief *supra* 4, at 7-8. The government's response is directed to a straw man.

The conflict arises because the Eleventh Circuit, misapplying *Neder*, held that the refusal to give an instruction that capsulizes Browne's key defense to the Taft-Hartley charges was harmless error because there was evidence at trial to contradict that defense. The court refused to review the record for evidence to support the incorrectly denied instruction, as the uniform case law requires. This is *not* to say that the refusal to give a requested theory-of-defense instruction can *never* be harmless error – a position that Browne has never advocated – but rather that the Eleventh Circuit applied the incorrect standard to determine whether reversible error follows from the erroneous denial of the requested instruction.[5]

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[5] The government's citation to *United States v. Kayser*, 488 F.3d 1070 (9th Cir. 2007), actually places the issue in proper context. BIO 26 n.7. In *Kayser*, the court reversed because the evidence supported the defendant's legally correct theory-of-defense instruction, 488 F.3d at 1076-77, applying precisely the standard from which the Eleventh Circuit inexplicably departed. In the cited footnote, the court noted that the defendant had argued for *per se* reversal for "any instructional error," and, declined to apply its pre-*Neder* precedent, held that "the district court's failure to give Kayser's proposed instruction prevented him from making a significant challenge" to an element of the tax-evasion charge "and thus cannot be harmless beyond a reasonable doubt." *Id.* at 1077 n.7. That is precisely the standard that the Eleventh Circuit *should* have

(continued . . .)

The distinction that evades the government is made clear by the Second Circuit's application of *Neder* in *United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006), in which the court reversed securities-fraud convictions because the district court erroneously refused to instruct on the defendant's element-based defense:

> Quattrone's theory of the case relied on several innocent explanations for his conduct and each has some basis in the record. Among these, Quattrone testified that he had no wrongful intent and that he was not aware that the investigations were focusing on IPO-allocation issues germane to Tech Group activity. While the government did offer proof that Quattrone knew that the grand jury and the SEC sought Tech IPO-allocation related documents, we cannot say that the proof convinces us beyond a reasonable doubt that the error was harmless. *See Neder*, 527 U.S. at 17. That conclusion finds strong support in the deficiency of the court's charge. Under the charge, the jury was allowed to convict Quattrone of obstruction regardless of whether he intended such. Quattrone's defense of lack of knowledge ... was eliminated from the jury's consideration. Accordingly, the judgment of conviction ... must be vacated and the case remanded for retrial.

Id. at 179-80 (record citations omitted).

(... continued)

applied, and *not* the *Neder* standard for review of a refusal to instruct on *unchallenged* elements of a charged crime. Petition at 21-22.

So too, here, the district court's refusal to charge the jury that supervisors are exempt from the pertinent Taft-Hartley prohibitions wholly deprived Browne of any opportunity to have the jury consider that defense. When the erroneous instruction is analyzed under the *correct* harmless-error standard, it cannot be deemed other than reversible error.

Respectfully submitted.

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